(23,864)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 263.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, STATE OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1914.

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1 *The Answer of the Judges of the Court of Common Pleas of Dauphin County, State of Pennsylvania, to the Writ of Error from the Supreme Court of the United States, Hereunto Annexed, as Follows, To wit:*

Writ of Error.

[Seal of the Supreme Court of the United States.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Common Pleas of Dauphin County, State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Common Pleas, before you, or some of you, in the said suit between Commonwealth of Pennsylvania and The Equitable Life Assurance Society of the United States wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said The Equitable Life Assurance Society of the United States as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the twenty-eighth day of August, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

2 (Endorsed:) 436 Comth. DK. 1910. Filed in Court of Common Pleas of Dauphin County, State of Pennsylvania, September 2, 1913. Lockwood B. Worden, Prothonotary. A. C. Stamm, Att'y for Plf. in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Common Pleas of Dauphin County, State of Pennsylvania wherein The Equitable Life Assurance Society of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this twenty-eighth day of August, in the year of our Lord one thousand nine hundred and thirteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

Service of the above citation accepted, September 2", 1913.

J. E. B. CUNNINGHAM,
First Deputy Attorney General of the Commonwealth of Pennsylvania.

(Endorsed:) 436 Comth. DK. 1910. Filed in Court of Common Pleas of Dauphin County, State of Pennsylvania, September 2, 1913. Lockwood B. Worden, Prothonotary. A. C. Stamm, Att'y for Plf. in Error.

Copy of Commonwealth Docket Entry.

Among the Records and Proceedings enrolled in the Court of Common Pleas in and for the County of Dauphin, in the Commonwealth of Pennsylvania, to No. 436 Comth., Dk., 1913, is contained the following:

Copy of Appearance Docket Entry.

COMMONWEALTH OF PENNSYLVANIA
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Appeal from the Settlement of an Account by the Auditor General & State Treasurer.

Nov. 21, 1910, Appeal & Specification of objections filed.
Nov. 22, 1910, Bond filed.
May 25, 1911, Agreement to consolidate 5 cases and try them as one, Nos. 436, 439, 438-437 Comth. Dk. 1910 & No. 83 Comth. Dk. 1911, and to be tried as No. 436 Comth. Dk. 1910.
July 6, 1911, Agreement to try without jury filed.
April 26, 1912. Testimony filed.
April 26, 1912, Affidavit of Wm. A. Day, Prest. filed.
April 26, 1912, Judgment directed to be entered in favor of the Defendant and against the Commonwealth, unless exceptions be filed within the time limited by law (See opinion filed).
3 April 29, 1912, Exceptions for the Commonwealth filed; same day exceptions overruled and judgment directed to be entered in accordance with opinion filed; Exceptions noted for the Commonwealth.
April 30, 1912, Certiorari sur appeal No. 23 May Term 1912 from the Supreme Court rec'd and filed.
May 1, 1912, Defendant's exceptions filed; same day exceptions sustained.
May 4, 1913, Remittitur from the Supreme Court received and filed certifying that the judgment of our court was reversed and record remitted that judgment may be entered in the court below for the balance due to Commonwealth in accordance with settlement made by accounting officers.
Aug. 12, 1913, by order of the court judgment is entered in favor of Commonwealth and against Deft. Co. for $115,253.89.
Sept. 2, 1913, petition for allowance of writ of error by U. S. Supreme Court to the Court of Common Pleas of Dauphin County, Pa., filed. Aug. 22, 1913, pursuant to the foregoing petition, writ of error allowed by Mahlon Pitney, Associate Justice.
Sept. 2, 1913, writ of error by U. S. Supreme Court to the Court of Common Pleas of Dauphin County, Pa., filed. Same day bond on appeal to U. S. Supreme Court filed.
Sept. 2, 1913, citation filed. Same day service of citation ac-

cepted by J. E. B. Cunningham, First Deputy Attorney General of the Commonwealth of Pennsylvania.

Appeal.

IN THE MATTER OF THE ACCOUNT FOR TAX ON GROSS PREMIUMS for the Year Ended the 31st day of December, 1906, Settled and Entered by the Insurance Commissioner against the EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES September 20, 1910, and Approved by the State Treasurer upon the same date, said tax amounting to $20,329.42, a copy of said account being hereunto attached.

The said Equitable Life Assurance Society of the United States hereby appeals from said settlement of its account to the Court of Common Pleas of Dauphin County, and files the following specifications of objection thereto:

1. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon an amount in excess of the gross premiums of every character and description received by appellant from business done within the State of Pennsylvania during the year ending December 31, 1906. The Premiums received from such business during said year were not $5,409,578.22, but were much less, to wit, $4,393,107.14.

2. Appellant is a corporation of the State of New York, with its principal office in the City of New York. The account hereby appealed from is erroneous, illegal and void because the tax therein charged is a tax upon gross premiums received by appellant from business done within the State of New York, or elsewhere
4 outside the State of Pennsylvania. Neither the Act of June 28, 1895, nor any other Act of Assembly imposes a tax upon gross premiums.

3. The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28, 1895, (P. L. 408), nor by any other Act of Assembly, or if it is the said Act is unconstitutional and void because in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania and which was never within the State of Pennsylvania. Neither the Act of June 28, 1895, (P. L. 408), nor any other Act of Assembly can be construed to impose a tax upon such

premiums, or if the said Act or any other Act of Assembly can be so construed it is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

5. The account hereby appealed from charges tax upon gross premiums "not within the territorial limits of the authority levying the tax," and is, for that reason, in violation of section 1 of Article IX, of the Constitution of Pennsylvania.

6. Appellant having heretofore paid, to wit, upon the — day of ——, 190– the full tax provided by law upon all of its premiums of every character and description received from business done within the Commonwealth within the calendar year 1906, and the Commissioner of Insurance having heretofore, to wit, upon the — day of ——, 190– issued to the appellant a certificate provided for by section 10 of the Act of April 4, 1873, (P. L. 20), showing that appellant was authorized to transact business in Pennsylvania it is not competent now for the Commonwealth to recover a further tax for said year upon any premiums of any class or character, and particularly upon or with respect to gross premiums received from business done without the Commonwealth of Pennsylvania and collected by and paid to appellant through its officers and agents residing and doing business outside of Pennsylvania, and the account hereby appealed from is erroneous, illegal and void.

7. Appellant is a corporation of the State of New York, authorized by its charter to do a life insurance business, with its principal office in the City of New York. The amount claimed in the account hereby appealed from represents gross premiums received by appellant in New York or elsewhere outside of Pennsylvania on contracts of insurance effected and entered into by appellant in New York or elsewhere outside of Pennsylvania. The said premiums, therefore, were received from business done in New York and elsewhere outside of Pennsylvania, and not from business within the Commonwealth of Pennsylvania, and they are not within the terms of the Act of June 28, 1895, (P. L. 408), nor of any other Act of Assembly, and the account hereby appealed from is therefore erroneous, illegal and void.

8. Insurance companies of other states and countries generally have been required to pay for the year 1906 tax on such premiums only as were paid to and collected by them within the State of Pennsylvania. The account hereby appealed from is erroneous, illegal and void because it is an attempt to discriminate against appellant and in favor of other insurance companies by collecting a tax from appellant not only upon or with respect to premiums paid to and collected by it within the State of Pennsylvania, but also upon and with respect to premiums paid to and collected by it outside the State of Pennsylvania, in violation of section 1 of Article IX of the Constitution of Pennsylvania, which provides that "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

9. Insurance Companies of other states and countries generally have been required to pay for the year 1906 tax on such premiums only as were paid to and collected by them within the State of Pennsylvania. The account hereby appealed from is erroneous, illegal and void because it is an attempt to discriminate against appellant and in favor of other insurance companies by collecting a tax from appellant not only upon or with respect to premiums paid to and collected by it within the State of Pennsylvania, but also upon and with respect to premiums paid to and collected by it outside the State of Pennsylvania, in violation of section 1 of Article
6 XIV of the Amendments to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

10. Appellant having prior to the date of the settlement hereby appealed from, paid into the State Treasury the full amount of tax on gross preminums received by its from business done within the State of Pennsylvania, there is nothing further due from it on account of tax on gross premiums, and the said account is wholly erroneous, illegal and void.

11. Appellant having prior to the date of the settlement hereby appealed from, paid into the State Treasury an amount in excess of the full tax on gross premiums received by it from business done within the State of Pennsylvania during the calendar year 1906, there is not only nothing further due it on account of tax on gross premiums for said year, but the Commonwealth is indebted to appellant in a large amount, to wit, $— for which amount it should have credit on account of any taxes due by appellant for future years.

12. The account hereby appealed from is erroneous, illegal and void because it was settled and entered by the Insurance Commissioner. There is no Act of Assembly authorizing or empowering the Insurance Commissioner to settle an account against appellant for a tax on gross premiums imposed by the Act of June 28, 1895, (P. L. 408), or by any other Act of Assembly.

13. In the account hereby appealed from the Commonwealth of Pennsylvania seeks to recover tax on "Gross premiums received from business done within the State of Pennsylvania for the year ended the 31st day of December, 1906, per Act of June 28, 1895, (P. L. 408)," the particular gross premiums with respect to which the tax is claimed all having been paid to appellant or its agents at points outside of Pennsylvania. The policies with respect to which the said gross premiums were paid being of four classes, viz:

1. Policies taken out outside of Pennsylvania by persons who were non-residents at the time the policies were taken out;

2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

4. Policies taken out in Pennsylvania by persons who
7 were non-residents of Pennsylvania at the time the policies were taken out.

The Commonwealth of Pennsylvania by her Insurance Commissioner, so long as it was in force, construed the 24th section of the Act of June 1, 1889, (P. L. 433), which imposed an annual tax "upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding" as not imposing any tax upon or with respect to premiums paid to appellant and other foreign insurance companies, or their agents, at points outside the State of Pennsylvania, and collected the tax accordingly. The Commonwealth had placed the same construction upon section 10 of the Act of April 4, 1873, (P. L. 26). In 1895 the Governor approved the Act under which the claim in the account hereby appealed from is made, in which the tax on gross premiums of foreign insurance companies is re-enacted in precisely the same language as that contained in the Act of June 1, 1889, supra; and the Insurance Commissioner has placed the same construction upon this Act of 1895 as upon the Act of 1889, i. e., has construed it not to require the report of, or to subject to taxation, the receipts of appellant and other foreign insurance companies from premiums paid to such companies or their agents at points outside the State of Pennsylvania, and has collected taxes according to this construction. Appellant in due course reported to the Insurance Commissioner its receipts from gross premiums of every character and description from business done within the Commonwealth of Pennsylvania for the calendar year 1906, not including premiums paid at points outside the State, and paid into the State Treasury the tax thereon provided by law; and the Iusurance Commissioner thereupon issued to appellant a certificate authorizing it to transact business within the State of Pennsylvania, as required and provided by section 10 of the Act of 1873, supra. The Insurance Commissioner of the Commonwealth having placed a construction upon the Act of 1889, supra, under which appellant would not be liable for the tax claimed in the account hereby appealed from, and a similar construction upon the Act of 1895, supra, and the Legislature having in 1895 impliedly sanctioned the construction placed upon the Act of 1889 by the Insurance Commissioner by the re-enactment of that Act, without alteration in so far as it imposed a tax upon the gross premiums of foreign insurance companies, and the Insurance Commissioner having issued to appellant a certificate authorizing it to do business in Pennsylvania during the year 1907, in pursuance of the payment by appellant into the State Treasury of the tax upon its gross premiums for the year 1906, as aforesaid, it is not competent now for the Commonwealth of Pennsylvania in the account hereby appealed from to collect a tax upon or with respect to gross premiums paid to appellant or its agents at points outside the State upon policies held by persons who were at the time of such payment residents of the State of Pennsylvania, and the account hereby appealed from is, therefore, wholly erroneous, illegal and void.

Harrisburg, Pa., November 18, 1910.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

By Its Attorneys, THOS. DE WITT CUYLER,
OLMSTED & STAMM.

8 (*Account.*)

Equitable Life Assurance Society of the United States, in account with the Commonwealth of Pennsylvania, Dr., to tax on Gross Premiums received from business done within the State of Pennsylvania for the year ended the 31st day of December, 1906, per Act of June 28th, 1895 (P. L., 408), based upon a report filed in the Insurance Department.

Premiums received	$5,409,578.22	
Tax at rate of 2%		$108,191.56
Cr.		
By payment on account		87,862.14
Balance due Commonwealth		$20,329.42

TREASURY DEPARTMENT,
HARRISBURG, PA., Sept. 20, 1910.

Approved:

H. D. JONES,
Cashier, for State Treasurer.

INSURANCE DEPARTMENT,
HARRISBURG, PA., Sept. 20, 1910.

Settled & Entered:
SAM'L W. McCULLOCH,
Insurance Commissioner.

(Endorsement:) No. 436. Commonwealth Docket, 1910. Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States. Appeal from the settlement of an account by the Auditor General and State Treasurer. Filed in the Insurance Commissioner's Office, the 19th day of Nov., 1910, for Sam'l W. McCulloch, Insurance Commissioner. Filed in the Prothonotary's Office, the 21 day of Nov., 1910. James H. Worden, Prothonotary. Olmsted & Stamm, Attorneys for Defendant.

Bond on Appeal.

Know all men by these presents, that we, the Equitable Life Assurance Society of the United States and American Surety Company of New York of the City of New York and State of New York, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of Forty thousand six hundred and fifty-eight and 84/100 Dollars ($40,658.84) lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania, or her certain Attorney or assigns, to which payment well and truly to be made we do bind ourselves, and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the Corporate Seal of said Company, and dated the 14th day of November, A. D. 1910.

Whereas, the above bounden Equitable Life Assurance Society of the United States has entered in the office of the Auditor General of Pennsylvania an appeal to the Court of Common Pleas of Dauphin County from the settlement of an account for tax on Gross Premiums for the year 1906 amounting to Twenty thousand, three hundred twenty-nine and 42/100 Dollars ($20,329.42), said account having been settled by the Insurance Commissioner on the 20th day of September, 1910, and approved by the State Treasurer on the 20th day of September, 1910.

Now the condition of this obligation is such that if the said Equitable Life Assurance Society of the United States shall prosecute its said appeal with effect, and pay all costs or charges which
9 the court of arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court of award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
By W. A. DAY, *Vice-President.*

Attest:

[Corporate Seal of the Equitable Life Assurance Society of the United States.]

S. S. McCURDY,
Ass't Secretary.

AMERICAN SURETY COMPANY OF NEW YORK, [L. S.]
By MARSHALL L. BROWER, [L. S.]
Resident Vice-President.

Attest:

[Corporate Seal of the American Surety Company of New York.]

JARED F. HARRISON,
Resident Assistant Secretary.

Signed, sealed and delivered in presence of

——— ———.
——— ———.

The security of the above bond is approved:
(Must be signed by a Judge of some Court in county where sureties reside.)

———— ————,

20695.

STATE OF NEW YORK,
County of New York, ss:

On this 14th day of November, 1910, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in New York, New York, that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with Jared F. Harrison and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Jared F. Harrison subscribed to the said instrument is in the genuine handwriting of the said Jared F. Harrison and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[NOTARIAL SEAL.] E. A. FARRELL,
Notary Public, New York County.

Certificate filed in all counties.

STATE OF NEW YORK,
County of New York, ss:

Jared F. Harrison being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue
10 of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws. That said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, Stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $6,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

JARED F. HARRISON.

Subscribed and sworn before me this 14th day of Nov., 1910.

[NOTARIAL SEAL.] E. A. FARRELL,
Notary Public, New York County.

Certificate filed in all counties.

(Endorsement:) No. 436. Commonwealth Docket, 1910. Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States. Filed Nov. 22, 1910. Bond on Appeal. From the Settlement of an Account by the Auditor General and State Treasurer. And now; Novr. 22d, 1910, the security of the within bond approved. By the Court. McC. A. L. J. Olmsted & Stamm, Attorneys for Defendants.

Agreement of Counsel.

In the Court of Common Pleas of Dauphin County.

No. 436, Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Tax on Gross Premiums, 1906.

No. 437, Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Tax on Gross Premiums, 1907.

No. 438, Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Tax on Gross Premiums, 1908.

11 No. 439, Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Tax on Gross Premiums, 1909.

No. 83, Com'th Docket, 1911.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Tax on Gross Premiums, 1910.

And now, to wit: May 25, 1911, it is hereby agreed between the Commonwealth of Pennsylvania, by the Attorney General, and The

Equitable Life Assurance Society of the United States, by its attorneys, as follows, viz:

The five above-entitled cases shall be consolidated and tried as one case to No. 436, Commonwealth Docket, 1910.

The gross premiums, with respect to which the Commonwealth in the above-entitled cases seeks to collect tax, were all paid to the defendant company, or its agents, at points outside the State of Pennsylvania, and they were all paid by persons who at the time of payment were residents of the State of Pennsylvania. The policies with respect to which the said premiums were paid are of the following four classes, viz.:

1. Policies taken out outside of Pennsylvania by persons who were non-residents at the time the policies were taken out;

12 2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

4. Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

The aggregate premiums for the years 1906, 1907, 1908, 1909 and 1910 paid outside the State of Pennsylvania by persons who at the time were residents of Pennsylvania were as follows, viz.:

1906	$1,016,471.08
1907	1,050,770.17
1908	1,019,281.76
1909	964,997.08
1910	876,786.45

These premiums were divided amongst the four classes above-named as follows, viz.:

Class.	1906.	1907.	1908.	1909.	1910.
1	$129,091.84	$142,546.45	$128,230.54	$116,100.24	$117,611.90
2	145,355.37	139,879.73	144,291.82	150,370.65	135,535.83
3	724,743.86	757,480.89	736,566.58	668,492.13	611,466.62
4	17,280.01	10,863.10	10,192.82	30,034.06	12,172.10

The defendant company has paid into the State Treasury of Pennsylvania the following taxes on gross premiums, viz.:

For the year 1906	$87,862.14
For the year 1907	86,656.24
For the year 1908	88,874.68
For the year 1909	93,190.76
For the year 1910	97,743.39

these being the full amounts of taxes due the Commonwealth for said years unless it shall be found by the Court that further taxes are due upon or with respect to any or all of the premiums on the four

classes of policies above-named paid at points outside of Pennsylvania by persons who at the time of payment were residents of the State of Pennsylvania.

WM. M. HARGEST,
Asst. Deputy Attorney General.
OLMSTED & STAMM,
Attorneys for Defendant.

(Endorsement:) Nos. 436, 437, 438, 439, C. D. 1910; 83, C. D. 1911. Commonwealth vs. Equitable Life Assurance Society of the U. S. Filed May 25, 1911. Agreement for consolidation to No. 436, C. D. 1910, & as to certain facts.

13 *Agreement to Try Without a Jury.*

In the Court of Common Pleas of Dauphin County.

No. 436, Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.

It is hereby agreed that a trial by jury be dispensed with in the above stated case, and that the same be submitted to the decision of the Court to be heard and determined under the provisions of an act, entitled "An Act to provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases at the option of either party.

July 6, 1911.

WM. M. HARGEST,
Ass't Deputy Att'y General.
OLMSTED & STAMM,
Attorneys for Defendant.

(Endorsement:) No. 436, Commonwealth Docket, 1910. Commonwealth vs. —— ——. Stipulation to try without jury. Filed July 6, 1911.

Stenographer's Notes of Testimony.

Dauphin County Common Pleas.

No. 436 Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
VS.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Dauphin County Common Pleas.

No. 437 Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
VS.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Dauphin County Common Pleas.

No. 438 Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
VS.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

14 Dauphin County Common Pleas.

No. 439 Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
VS.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Dauphin County Common Pleas.

No. 83 Commonwealth Docket, 1911.

COMMONWEALTH OF PENNSYLVANIA
VS.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Before Hon. George Kunkel, P. J., at Harrisburg, Penna., July 6, 1911.

Appearances:

For Commonwealth: Hon. John C. Bell, Attorney General; Hon. J. E. B. Cunningham, Deputy Attorney General; Hon. W. M. Hargest, Ass't. Deputy Attorney General.
For Defendant: Messrs. Olmsted & Stamm.

Mr. HARGEST: If the Court please, I desire to submit the cases of the Commonwealth vs. Equitable Life Assurance Society of the United States, to Nos. 436, 437, 438, 439, 1910, and No. 83, 1911, Commonwealth Docket.

This is a claim for tax on gross receipts for the years 1906, 1907, 1908, 1909, and 1910.

15 I have a stipulation to try without a jury, which I submit; and I offer in evidence the settlements for the several years, and agree that all of the cases may be tried to the first number. We file an agreed statement of facts, and a stipulation that the cases may be consolidated and tried as one case to No. 436.

The questions in this case are new. This is a tax on gross premiums. The act of assembly requires the company to pay on premiums on the business done in the Commonwealth.

There are four classes of policies, each slightly differing from the other, which the defendant contends do not represent business done within the Commonwealth.

1. Policies taken out outside of Pennsylvania by persons who were non-residents at the time the policies were taken out.

2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.

3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.

4. Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

This statement ought to be amplified, and we will amplify it by either an affidavit on the part of the company, or by another supplemental agreement.

So that there are four classes of policies involved in this controversy, and each of the four classes are included in the gross premiums claimed for each of the several years. The amount applicable for each class for each year is set out in the schedule in this agreement.

Mr. OLMSTED: May it please the court, on behalf of the defendant I offer the appeal duly filed from the account for 1906, filed to No. 436 Commonwealth Docket 1910; the appeal from the account for 1907, filed to No. 437 Commonwealth Docket 1910; the appeal from the account for tax for the year 1908, the appeal entered to No. 439, Commonwealth Docket 1910; the appeal from the account for tax for 1909, filed to No. 438 Commonwealth Docket 1910; and the appeal from the tax for 1910 filed to No. 83 Commonwealth Docket 1911.

The learned Deputy Attorney General has already submitted a statement signed by counsel as to certain facts.

It is understood that the defendant will submit an additional deposition of a certain officer of the company, simply amplifying some of the things that are set forth in the statement, and perhaps containing additional facts which will be necessary for proper understanding of the cases. [See note at end.]

Mr. OLMSTED: The facts are, may it please the court, that this company reported for each of these years very large amounts of premiums received within the state, and being all the premiums re-

ceived within the state during these several years, and accounts were settled against it and the tax was paid upon those premiums; but subsequently, the present Insurance Commissioner has conceived the idea that if the insured person is a resident of Pennsylvania at the time of paying the premium, even though the premiums were paid not in the state, and not to any agency within this state, and not to any agent in the state, but to some of the agencies in other states, nevertheless those premiums are subject to tax in this state; and the matter to be determined is, whether or not in the four classes of cases mentioned here, all or any of them, the state is entitled to any tax.

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In the first place, I should say that the tax is in the nature of a license fee. The last act upon the subject is that of 1895. The first act that I find upon the subject—because there were earlier ones—is the act of 1868. I merely refer to it to give the history of this matter. The act is entitled "An Act to revise, amend and consolidate the several laws regulating the licensing of foreign insurance companies," approved April 11, 1868, P. L. 1868, page 83. Now that act imposed a tax at three (3) per cent., and the license was not to be renewed until the tax aforesaid was paid. That act would be worthy of consideration simply for the purpose of showing the character of tax, that it is a tax in the nature of a license fee for the privilege of doing business in this state.

Then we have the act of 1873, page 20, entitled "An Act to Establish an Insurance Department." That act again fixes the tax at three (3) per cent., and provides it shall be paid substantially in the nature of a license fee for permission to do business in the state, and provides that no license shall be renewed unless the tax has been paid. The taxes of this company, according to the reports made by it were paid for each of these several years, and in each instance its license to do business was renewed.

Then comes the act of June 28, 1895, page 408, and the same being an amendment of the general tax law. A proviso was put in at the end of Section 1, reading as follows:

"That hereafter the annual tax upon premiums of insurance companies of other States or foreign governments, shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar-year preceding."

That is the act under which this tax is now claimed, and our contention, heretofore stated, is that we have already paid the tax upon all the business done within this Commonwealth during the several years, and the taxes were very heavy. For instance:

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For the year 1906	$87,862.14
For the year 1907	86,656.24
For the year 1908	88,874.68
For the year 1909	93,190.76
For the year 1910	97,743.39

Upon payment of those sums licenses were in each case issued, which enabled the company to do business for the then succeeding year. It is now for this year, 1911, doing business under a license granted upon the payment of the said $97,743.39 for 1910. And the question for the court to determine is, whether we owe these additional sums which have been charged in respect to the premiums paid to and received by the company in other states. It perhaps is inferrible, but as the learned Deputy Attorney General says, it ought to be amplified a little bit to show that they have since moved into Pennsylvania and are now resident here; I believe that would be the case, and we will have that set forth in the additional affidavit.

Now as to that class, what business was done in Pennsylvania during any of these years, policies were taken out outside of the state granted to non-residents of the state, premiums were paid outside of the state, but the party has moved into the state and was in the year in which the tax is claimed a resident of the state. Does his moving into the Commonwealth constitute the doing of business by this insurance company?

Second class: Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out. I suppose the Commonwealth would like that amplified, to show that they continued to be residents, which I believe to be the fact. A man goes from Harrisburg to New York and there takes out a policy of insurance in a New York insurance company; is that doing business by that company in Pennsylvania.

The COURT: What is the language of the act of 1895?

18 Mr. OLMSTED: The language of the act of 1895 is, "that hereafter the annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding."

Now we say that the business was done when the policy was taken out. And if the policy was taken out in New York, there was no business done in Pennsylvania at all, no business of the character requiring the company to have a license in Pennsylvania. Had that been the only character of transaction in which it engaged, it would have required no license from the state of Pennsylvania; no permission to do business here; would have required no agent here. It did not transact any business here in respect to that policy at all.

The COURT: Your contention is, that the act of 1868 and 1873 imposed this tax as a license fee for doing business, and that the act of 1895 provides only a lower rate?

Mr. OLMSTED: Yes, it changed the phraseology a little bit, but narrowed it. We will show all that in a more elaborate brief of argument which we will submit.

The third class consists of policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out. That is to say, as I understand it, residents of Pennsylvania who were solicited by agents of the company in Pennsyl-

vania and took out policies of insurance. The first premium we assume was paid in this state, but subsequently to suit the convenience of the parties or of the company or for business reasons generally, those particular policies, the premiums are now paid in the state of New York. What business was done in Pennsylvania in the payment of that premium? A man sends his check to New York to pay a premium on an insurance policy, is that doing business in Pennsylvania by that company?

The COURT: As I understand, the policies were taken out in the state by residents of the state?

Mr. OLMSTED: Originally taken out in the state by per-
19 sons who were then residents of the state, but not within the year for which the tax is charged.

The COURT: You say you paid your tax on the premium at the time the business was done?

Mr. OLMSTED: The tax has been paid during all these years on the premiums received in Pennsylvania.

Mr. HARGEST: That is, received by Pennsylvania agents in Pennsylvania, that is, what they have paid tax on.

The COURT: The Commonwealth's contention is, although the policy was taken out in the state by residents, that afterwards the resident moved out of the state and paid the premiums afterwards here, and the business was going on in the state of Pennsylvania, still being done?

Mr. HARGEST: Yes, sir. They do not seem to contest that proposition very much. It is the other proposition they contest most strenuously, that where the premiums are paid to an outside agent, that is not doing business in Pennsylvania, although the person paying the premium lives here.

Mr. OLMSTED: Premiums received in this state have been taxed, and the tax, as I have shown, amounts to a very large amount. These premiums were paid to the company or its agents in other states. The question is, Did that constitute any doing business by the company? Did it require any license for the company in New York to receive in New York a premium from a resident Pennsylvania not received through any agent in Pennsylvania? We maintain that had that been the only way in which the company was related to the state of Pennsylvania, it would not have been doing business here, would not have required any license, would not be subject to this tax.

Now the fourth class relates to policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out, and I assume that the learned Deputy asks to have that a little amplified to show that they are now residents of Pennsylvania or were in this state in the years for which the taxes were charged, and to that we will give attention in the form of a deposition, which we will prepare and submit to him, and
20 then hand it to the stenographer, with like effect as if it were presented to the court to-day.

That is merely a brief statement of the questions involved. We

will elaborate them in a brief to be submitted, referring at length to the statutes relating to the subject, the authorities, etc.

Mr. HARGEST: The Commonwealth's position as to most of these, is, that premiums paid by residents of the state to agents of the state are taxable—that is doing business in the state, regardless of where the contract originally happened to be made; that is to say, this is a continuing contract which shifts with the person; and it has been several times decided to be doing business in the state where a contract of insurance is made with an agent in one state and the company subsequently withdraws from the state and has no agent there, the person living there and continuing to pay premiums. Upon that theory the Commonwealth contends that, because an agent happens to be living in Ohio and for personal reasons a man does business with a New York corporation through the medium of a man happening to live in Ohio, that that is not doing business in Ohio. If it is not doing business in New York, the contention of the defendant must be that it is doing business in Ohio. If it were doing business in New York, merely because the contract of insurance is made in New York where the corporation lives, then it would be taxable, in New York, and not in Ohio.

Mr. OLMSTED: It seems to me that the argument of the Commonwealth would militate against its claim as against some of these classes; for instance, policies taken outside of Pennsylvania by persons who were non-residents at the time.

Mr. HARGEST: It may be that neither the Commonwealth nor the defendant can win on all of these propositions.

The COURT: The Commonwealth will have to determine which of the contradictory positions it proposes to sustain.

Mr. OLMSTED: We do not think the Commonwealth ought to win on any of these propositions.

The COURT: If the Commonwealth has two contradictory
21 positions and ask- the court to determine, it must endeavor to select between the two.

Mr. HARGEST: Both sides will file a brief, in which we will endeavor to argue out each of the four classes, and differentiate, if we can.

(Briefs to be filed, and time for oral argument to be agreed upon.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above case, and that this copy is a correct transcript of the same.

FRANK J. ROTH,
Official Stenographer.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

—— ——, *Judge.*

(Endorsement:) No. 436, Com. Docket, 1910. Commonwealth of Penna. vs. Equitable Life Assurance Society of the United States. Filed April 26, 1912. Testimony. Frank J. Roth, Official Stenog.

Affidavit of William A. Day.

In the Court of Common Pleas of Dauphin County.

No. 436, Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
VS.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

STATE OF NEW YORK,
City of New York, ss:

On this 21st day of September, A. D. 1911, before me, a Notary Public in and for said State, residing in said city, personally appeared William A. Day, who, being by me duly sworn according to law, did depose and say as follows, viz.:

I am the President of the above-named defendant, The Equitable Life Assurance Society of the United States. Prior to my selection as President, I was Vice-President of the company, and prior to that was its Comptroller.

The Equitable Life Assurance Society of the United States, the above-named defendant, is a corporation chartered by the State of New York and having its principal office and place of business in the City of New York in said State. It is, as its title indicates,
22 a life insurance company, and it is extensively engaged in that business. It does business in Great Britain, France, Spain, Holland, Belgium, Turkey, Japan, Egypt, Algiers, and, indeed, all the nations of the world with very few exceptions. In the United States, it does business in all the States of the Union except Wisconsin and Texas; but, quite naturally perhaps, a larger proportion of its business is transacted in New York than in other States, that being the State of its creation and where its principal or home office is located. In each State where it transacts business it is licensed under the laws thereof. In each State, with the exception of Nevada, where it transacts business the laws thereof require it to pay a tax upon premiums. In each State where it transacts business it pays the tax required by the laws thereof to be paid upon its premiums, and did pay such tax for each of the years embraced within the above-entitled suit—1906 to 1910, both inclusive.

In the beginning of the year 1907 the defendant society reported to the Insurance Commissioner of Pennsylvania premiums to the amount of $4,393,107.14, received from business done in Pennsylvania during the preceding calendar year, as shown by report which I am advised has already been offered in evidence in this case, and paid thereon a tax of two per centum, amounting to $87,862.14, and thereupon received from the said Insurance Commissioner of Pennsylvania a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the year ended March 31st, 1908.

In the beginning of the year 1908 the defendant Society reported to the Insurance Commissioner of Pennsylvania premiums to the amount of $4,332,811.81, received from business done in Pennsylvania during the preceding calendar year, as shown by report which I am advised has already been offered in evidence in this case, and paid thereon a tax of two per centum, amounting to $86,656.24, and thereupon received from the said Insurance Commissioner of Pennsylvania a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the year ended March 31st, 1909.

23 In the beginning of the year 1909 the defendant society reported to the Insurance Commissioner of Pennsylvania premiums to the amount of $4,443,734.15, received from business done in Pennsylvania during the preceding calendar year, as shown by report which I am advised has already been offered in evidence in this case, and paid thereon a tax of two per centum, amounting to $88,874.68, and thereupon received from the said Insurance Commissioner of Pennsylvania a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the year ended March 31st, 1910.

In the beginning of the year 1910 the defendant society reported to the Insurance Commissioner of Pennsylvania premiums to the amount of $4,659,538.06, received from business done in Pennsylvania during the preceding calendar year, as shown by report which I am advised has already been offered in evidence in this case, and paid thereon a tax of two per centum, amounting to $93,190.76, and thereupon received from the said Insurance Commissioner of Pennsylvania a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the year ended March 31st, 1911.

In the beginning of the year 1911 the defendant society reported to the Insurance Commissioner of Pennsylvania premiums to the amount of $4,887,169.61, received from business done in Pennsylvania during the preceding calendar year, as shown by report which I am advised has already been offered in evidence in this case, and paid thereon a tax of two per centum, amounting to $97,743.39, and thereupon received from the said Insurance Commissioner of Pennsylvania a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the year ending March 31st, 1912.

Separate reports were made to the Insurance Commissioner as above set forth. It was not pretended that they included all the premiums received from residents of Pennsylvania, but at or about the same time, and before the issuance of the respective li-

24 censes above mentioned, additional reports were made for each year showing additional premiums received outside of Pennsylvania upon policies held by residents of Pennsylvania. These premiums were almost exclusively renewal premiums received outside of Pennsylvania in renewal of policies held by residents of Pennsylvania. The defendant society did not consider such premiums received outside of Pennsylvania as taxable in said State and

no tax was paid thereon. The premiums thus reported to the Insurance Commissioner were as follows:

Year.	Premiums collected in State.	Premiums collected outside State.	Total.
1906.....	$4,393,107.14	$1,016,471.08	$5,409,578.22
1907.....	4,332,811.81	1,050,770.17	5,383,581.98
1908.....	4,443,734.15	1,019,281.76	5,463,015.91
1909.....	4,659,538.06	964,997.08	5,624,535.14
1910.....	4,887,169.61	876,786.45	5,763,956.06

In the published reports of the Insurance Commissioner for the years 1906, 1907 and 1908, under the head of "Business in Pennsylvania," the Commissioner included only the premiums collected in the State as above set forth, thus apparently accepting the Society's construction of the law with the full knowledge of the facts; but in his published report for 1909 under the head of "Business in Pennsylvania," he inserts the totals above given for that year, thus including the premiums collected outside of the State. Attached hereto and made part hereof and marked respectively Exhibits A. B. C. D. E and F, are full, true and correct copies of certificates of authority issued to this company by the Insurance Commissioner of Pennsylvania and covering the years in question.

Under date of February 21, 1910, I, being then Vice-President of this society, wrote the Insurance Commissioner of Pennsylvania enclosing a check for $93,190.76, in payment of the two per cent tax on $4,659,538.06 of gross premiums for the year 1909. The Insurance Commissioner under date of February 25, 1910, acknowledged receipt and added—

"I find, however, on examination of the annual statement that there was $964,997.08 of premiums received on insurance
25 written and in force on the lives of citizen- of the State but collected outside the State which you have not reported for taxation."

This was the first intimation the Society had received that the Insurance Commissioner did not accept the Society's construction of the law.

Under date of March 19, 1910, I replied, stating that—

"The reason why a tax was not paid on this sum of $694,997.08 is that, in our opinion, it did not constitute receipts from 'business done within this Commonwealth' (Pennsylvania), as we think, will appear from the following description of the three classes of policies from which the premiums making up the sum in question were derived:

"1. Policies taken out outside Pennsylvania by non-residents of Pennsylvania who have since moved to that State, but continue to pay their premiums outside where the business was done.

"2. Policies taken out outside Pennsylvania by residents of Pennsylvania who pay their premiums outside where the business was done.

"3. Policies taken out in Pennsylvania by residents of Pennsyl-

vania who for business reasons paid their premiums in the particular year outside of Pennsylvania."

Under date of September 20, 1910, the Insurance Commissioner of Pennsylvania addressed to the Treasurer of this company a letter, duly received and reading as follows:

"I am enclosing herewith settlement of additional taxes due the State of Pennsylvania by your company from premiums collected for the year- 1906, '07, '08 and '09, and have placed the accounts in the hands of the Attorney General for collection."

Subsequently, a similar "settlement" was received from the Insurance Commissioner, claiming additional taxes for 1910. Appeals from these so-called "settlements" or claims were taken by the society to the Court of Common Pleas of Dauphin County, and I am advised that counsel for the Commonwealth and for the Society have heretofore entered into an agreement consolidating the five cases
26 and agreeing upon certain facts, which agreement (omitting the caption and signatures) is — the following form:

"And now, to wit: —— —, 1911, it is hereby agreed between the Commonwealth of Pennsylvania, by the Attorney General, and The Equitable Life Assurance Society of the United States, by its attorneys, as follows, viz.:

"The five above-entitled cases shall be consolidated and tried as one case to No. 436, Commonwealth Docket, 1910.

"The gross premiums, with respect to which the Commonwealth in the above-entitled cases seeks to collect tax, were all paid to the defendant company, or its agents, at points outside the State of Pennsylvania, and they were all paid by persons who at the time of payment were residents of the State of Pennsylvania. The policies with respect to which the said premiums were paid are of the following four classes, viz:

"1. Policies taken out outside of Pennsylvania by persons who were non-residents at the time the policies were taken out;

"2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

"3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

"4. Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

"The aggregate premiums for the years 1906, 1907, 1908, 1909 and 1910 paid outside the State of Pennsylvania by persons who at the time were residents of Pennsylvania were as follows, viz.:

1906	$1,016,471.08
1907	1,050,770.17
1908	1,019,281.76
1909	964,997.08
1910	876,786.45

"These premiums were divided amongst the four classes above-named as follows, viz.:

Class.	1906.	1907.	1908.	1909.	1910.
1.	$129,091.84	$142,546.45	$128,230.54	$116,100.24	$117,611.90
2.	145,355.37	139,879.73	144,291.82	150,370.65	135,535.83
3.	724,743.86	757,480.89	736,566.58	668,492.13	611,466.62
4.	17,280.01	10,863.10	10,192.82	30,034.06	12,172.10

27 "The defendant company has paid into the State Treasury of Pennsylvania the following taxes on gross premiums, viz.:

For the year 1906	$87,862.14
For the year 1907	86,656.24
For the year 1908	88,874.68
For the year 1909	93,190.76
For the year 1910	97,743.39

these being the full amounts of taxes due the Commonwealth for said years unless it shall be found by the Court that further taxes are due upon or with respect to any or all of the premiums on the four classes of policies above-named paid at points outside of Pennsylvania by persons who at the time of payment were residents of the State of Pennsylvania."

The facts stated in the said agreement are correct and true. I have been asked, however, to explain more fully the facts set forth in said agreement, and will attempt to do so.

It may help to a more perfect understanding if I state, in the first instance, the normal and usual course of the defendant society's business in issuing and renewing policies of insurance and collecting premiums thereon. Annexed hereto, made part hereof and marked "Exhibit G," will be found the form of the ordinary life policy issued by the Society. The insured pays the first premium upon the receipt of the policy. Such payment leaves the policy in force for one year. The policy holder has the right to renew the policy for another year by paying another premium. Such premium and each succeeding premium is known as a "Renewal Premium." It is optional with the insured to pay a renewal premium and obligatory upon the society to receive it. The society cannot compel the insured to pay a renewal premium, but the insured can compel the company to receive it, or, what is equivalent, keep the policy alive by tendering it.

The Society sometimes issues policies calling for the payment of renewal premiums semi-annually or quarterly. It sometimes issues somewhat different forms of policies; as for instance, instead of requiring a certain renewal premium to be paid each year during the life of the insured, it may provide for the payment of a
28 specified premium in each of a certain specified number of years—and the like. But the principle as to the payment of first premiums and renewal premiums is the same as in the case of the ordinary life policy, the form of which is given.

Except in those cases where parties apply at the home office of the society, or at some of its agencies, for policies of insurance, without solicitation by any intermediary agent, the usual course is for the insurance to be solicited by an agent licensed by the State where the

party solicited resides. If the party so solicited makes an application, the same is forwarded to the home office by the agent, and at the home office is passed upon and either accepted or declined. If accepted, the policy is then forwarded to the applicant through the soliciting agent, and the first premium is paid to the soliciting agent and by him forwarded, and thus it finally reaches the treasury of the company at its home office. The agent who originally solicited the policy does not receive the renewal premiums, but the company maintains what may be called cashier agencies for the receipt of such premiums. It has three such cashier agencies in Pennsylvania—one at Philadelphia, one at Pittsburgh and one at Allentown. At each of said agencies there is a cashier whose business it is to receive renewal premiums. The company does not employ agents in Pennsylvania to collect renewal premiums. It sends to the proper cashier agency the proper form of receipt under the "Payment of Premium" clause in the policy, as shown in "Exhibit G," and upon payment of the renewal premium by the insured at the cashier agency, the receipt is delivered to him, showing the payment of the renewal premium, thus extending and continuing the life of the policy, or contract of insurance, which otherwise would have terminated. The society usually knows where it is most convenient for the insured to make payment; but frequently, upon request, transfers him from one cashier agency to another. As a good many insured persons residing in Pennsylvania frequently visit, or have business, correspondents and bank accounts, in the City of New York, they frequently find it more convenient to pay their premiums here; or, if they happen
to live nearer to, or have business relations with, or bank ac-
29 counts in, some of the other cities in New York, or in Ohio, New Jersey or Maryland, where the Society also maintains cashier agencies, they find it convenient to pay their premiums there. The Society never refuses to transfer an insured person from one cashier agency to another for the payment of renewal premiums and the consequent renewal of the policy, it being to the general interest of the company to be as obliging as possible and it making very little difference, if any, to the Society where the renewal premium is actually paid. In view of the fact that so many people in Pennsylvania do business in the City of New York, it is hardly to be wondered at that a good many who are insured in the defendant Society prefer to pay their renewal premiums in New York City, or at other cashier agencies at other than Pennsylvania points which may, for business or other reasons, be more convenient for them than the Pennsylvania cashier agencies. In such cases, renewal premiums are paid by the insured in person at the home office or the cashier agency at which he elects to make his payment, or checks are sent by him by mail, to such home office or cashier agency.

As to the first class mentioned in the aforesaid agreement, namely, "Policies taken out outside of Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out,"—so far as the taking out of these policies was solicited at all, the solicitation was made in States other than Pennsylvania and by

officers or agents of the company licensed by and transacting business for the company in said other states. The policies were issued and delivered to the insured, in the usual course of business, either at the company's general offices in the City of New York, or through agencies and by agents duly authorized and licensed in states other than Pennsylvania, and the persons whose lives were insured were at the time of the taking out of said insurance, and the issuance of said policies, non-residents of Pennsylvania. These insured persons subsequently became residents of Pennsylvania, but continued to pay their renewal premiums outside the State of Pennsylvania.

30 Some subsequent payments of premiums in renewal or extension of such original contracts of insurance may have been made in Pennsylvania; but if so, all such premiums have been reported and the tax therein paid by the society into the Treasury of Pennsylvania. The premiums set forth in the aforesaid agreement as paid upon policies of the first class in the years 1906, 1907, 1908, 1909 and 1910, were all paid outside of the State of Pennsylvania, either at the company's general offices in New York, or at some of its other agencies outside of Pennsylvania and authorized and licensed by other states.

As to the second class mentioned in the aforesaid agreement, namely, "Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out,"—the insurance covered by these policies was either applied for directly at the general offices of the company in New York, or at some of its licensed agencies in states other than Pennsylvania, or was solicited in states other than Pennsylvania by agents of the defendant duly authorized and licensed by said states. The premiums upon said policies were paid by the insured persons to the defendant, or its officers or agents, at its general offices in the City of New York, or at agencies or through agents licensed in States other than Pennsylvania. Unless there have been exceptional cases which I do not now recall, it may properly be said that no business whatever in relation to policies of Classes 1 and 2, either in the matter of the taking out of the original insurance, or the renewal thereof by payment of the renewal premiums upon said policies, was transacted within the State of Pennsylvania. If any subsequent payments of premiums in renewal or extension of the original contract of insurance were made in Pennsylvania, they were reported and taxed. All original premiums and all renewal premiums paid in Pennsylvania upon any class of policies have been reported and the tax thereon paid by the society into the treasury of Pennsylvania; but the premiums of Classes 1 and 2, as divided in the aforesaid agreement of counsel, were all paid to the society outside the State of Pennsylvania.

As to the third class mentioned in the aforesaid agreement, namely, "Policies taken out in Pennsylvania by persons who

31 were residents of Pennsylvania when the policies were taken out," these insured persons were residents of Pennsylvania at the time when the policies of insurance were issued and delivered to them and the first premiums paid thereon and they still are residents of Pennsylvania. The said original insurance was effected by

or through agents licensed in Pennsylvania, and by them the policies were delivered in the usual course of business to the said insured persons. The first premium, being the premium paid to effect the said original contract of insurance, was paid in Pennsylvania, and some subsequent payments of premiums in renewal or extension of the original contracts of insurance may have been made in Pennsylvania. The original premiums and all the renewal premiums paid in Pennsylvania upon such policies have been reported and the tax thereon paid by the society into the treasury of Pennsylvania. I have already explained how the place of transacting this business of renewal is practically optional with the insured, and have also explained the manner in which, when the business is conducted outside of Pennsylvania, the payments of renewal premiums are made. As to the premiums of Class 3, mentioned in the aforesaid agreement, the facts are as follows:

The $724,743.86 premiums of Class 3, collected by the defendant society in 1906, were all paid by the insured persons directly to the defendant society at its general offices in the State of New York, or at its cashier agencies in States other than Pennsylvania. The said premiums were neither solicited, collected, nor paid within the State of Pennsylvania. In 1906 no business whatever in relation to the policies upon which the said premiums were paid (either as to the original policy, or the extension or renewal thereof, or to the payment of the said premiums thereon) was transacted within the State of Pennsylvania, or by or through any of the company's agents or agencies in the State of Pennsylvania, or as the result of any license granted by the State of Pennsylvania; but the said business was wholly transacted by defendant at its general offices or agencies in New York, or elsewhere, in states other than Pennsylvania.

32 The $757,480.89 premiums of Class 3, collected by the defendant society in 1907, were all paid by the insured persons directly to the defendant society at its general offices in the State of New York, or at its cashier agencies in States other than Pennsylvania. The said premiums were neither solicited, collected nor paid within the State of Pennsylvania. In 1907 no business whatever in relation to the policies upon which the said premiums were paid (either as to the original policy, or the extension or renewal thereof, or to the payment of the said premiums thereon) was transacted within the State of Pennsylvania, or by or through any of the company's agents or agencies in the State of Pennsylvania, or as the result of any license granted by the State of Pennsylvania; but the said business was wholly transacted by defendant at its general offices or agencies in New York, or elsewhere, in states other than Pennsylvania.

The $736,566.58 premiums of Class 3, collected by the defendant Society in 1908, were all paid by the insured persons directly to the defendant Society at its general offices in the State of New York, or at its cashier agencies in States other than Pennsylvania. The said premiums were neither solicited, collected, nor paid within the State of Pennsylvania. In 1908 no business whatever in relation to the policies upon which the said premiums were paid (either as to the

original policy, or the extension or renewal thereof, or to the payment of the said premiums thereon) was transacted within the State of Pennsylvania, or by or through any of the company's agents or agencies in the State of Pennsylvania, or as the result of any license granted by the State of Pennsylvania; but the said business was wholly transacted by defendant at its general offices or agencies in New York, or elsewhere, in States other than Pennsylvania.

The $668,492.13 premiums of Class 3, collected by the defendant Society in 1909, were all paid by the insured persons directly to the defendant Society at its general offices in the State of New York, or at its cashier agencies in States other than Pennsylvania. The said premiums were neither solicited, collected, nor paid within the State of Pennsylvania. In 1909 no business whatever in relation
33 to the policies upon which the said premiums were paid (either as to the original policy, or the extension or renewal thereof, or to the payment of the said premiums thereon) was transacted within the State of Pennsylvania, or by or through any of the company's agents or agencies in the State of Pennsylvania, or as the result of any license granted by the State of Pennsylvania; but the said business was wholly transacted by defendant at its general offices or agencies in New York, or elsewhere, in States other than Pennsylvania.

The $611,466.62 premiums of Class 3, collected by the defendant Society in 1910, were all paid by the insured persons directly to the defendant Society at its general offices in the State of New York, or at its cashier agencies in States other than Pennsylvania. The said premiums were neither solicited, collected nor paid within the State of Pennsylvania. In 1910 no business whatever in relation to the policies upon which the said premiums were paid (either as to the original policy, or the extension or renewal thereof, or to the payment of the said premiums thereon) was transacted within the State of Pennsylvania, or by or through any of the company's agents or agencies in the State of Pennsylvania, or as the result of any license granted by the State of Pennsylvania; but the said business was wholly transacted by defendant at its general offices or agencies in New York, or elsewhere, in States other than Pennsylvania.

As to the fourth class mentioned in the aforesaid agreement, namely, "Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out"—these policies were issued through Pennsylvania agents or agencies of the defendant to persons who were at the time non-residents of Pennsylvania: but, at the time of the payment of the premiums in the years 1906, 1907, 1908, 1909, 1910, as set forth in the agreement, they were residents of Pennsylvania. The policies were taken out in Pennsylvania in years prior to those in which the respective premiums thereon were paid, as set forth in the agreement. The said premiums, so set forth in the agreement, were all renewal premiums, and none of them were paid to or through
34 any agent or agency of defendant company in Pennsylvania. They were all paid directly to the company at its general

offices in New York, or through its agent or agencies at other points in States other than Pennsylvania and to or through agents or agencies in said States other than Pennsylvania. No business whatever in relation to said policies or the renewal thereof or the premiums paid thereon or in renewal thereof, was transacted within the State of Pennsylvania during the respective years within which the said renewal premiums, as set forth in the agreement, were paid.

The premiums dealt with in this affidavit, or deposition, are premiums which were collected outside of the State of Pennsylvania in the years specified from residents of Pennsylvania. They were substantially all what are called renewal premiums, that is to say, payments made for the purpose of extending and renewing contracts of insurance. No business as to the original policies, nor as to the renewal thereof, was transacted in Pennsylvania during the year within which any premium was paid as set forth herein or in the agreement of counsel herein referred to.

All of which is correct and true, according to the best of my knowledge, information and belief.

W. A. DAY.

Sworn and subscribed before me the day and year aforesaid.
[NOTARIAL SEAL.] JOHN B. RUSSELL,
Notary Public.

My Commission Expires March 30, 1912.

35 EXHIBIT A.

(Copy.)

Form E. No. 1.

Commonwealth of Pennsylvania.

Insurance Department.

HARRISBURG, PA., April 2, 1906.

Whereas, The Equitable Life Assurance Society of the U. S., located at New York, in the State of New York, has appointed I. Layton Register of Philadelphia, as its Agent and Attorney in this State, on whom process of law can be served, and filed in this Department a certified copy of its charter and a detailed statement of its Assets and Liabilities, and otherwise complied with the requirements of an Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act to establish an Insurance Department," approved the 4th day of April, A. D. 1873:

Now Therefore, I, David Martin, Insurance Commissioner of the State of Pennsylvania, in pursuance of the Act aforesaid, do hereby certify that the Equitable Life Assurance Society of the U. S. is hereby authorized and empowered by its said Agent or Attorney and by the several Agents appointed and duly commissioned in accordance with the eleventh section of said Act of Assembly, to transact

the business of Insurance for the year ending March 31, 1907, in the State of Pennsylvania according to the terms of its charter and in conformity to the laws of said State.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal of the Insurance Department, State of Pennsylvania.]

DAVID MARTIN,
Insurance Commissioner.

36 EXHIBIT B.

(Copy.)

Form E. No. 1.

Commonwealth of Pennsylvania.

Insurance Department.

HARRISBURG, PA., April 1st, 1907.

Whereas, The Equitable Life Assurance Society of the U. S., located at New York, in the State of New York, has appointed I. Layton Register of Philadelphia, as its Agent and Attorney in this State, on whom process of law can be served, and filed in this Department a certified copy of its charter and a detailed statement of its Assets and Liabilities, and otherwise complied with the Requirements of an Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act to establish an Insurance Department," approved the 4th day of April, A. D. 1873:

Now Therefore, I, David Martin, Insurance Commissioner of the State of Pennsylvania, in pursuance of the Act aforesaid, do hereby certify that the Equitable Life Assurance Society of the U. S. is hereby authorized and empowered by its said Agent or Attorney and by the several Agents appointed and duly commissioned in accordance with the eleventh section of said Act of Assembly, to transact the business of Insurance for the year ending March 31, 1908, in the State of Pennsylvania according to the terms of its charter and in conformity to the laws of said State.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal of the Insurance Department, State of Pennsylvania.]

DAVID MARTIN,
Insurance Commissioner.

EXHIBIT C.

(Copy.)

Form E. No. 1.

Commonwealth of Pennsylvania.

Insurance Department.

HARRISBURG, PA., April 1st, 1908.

Whereas, The Equitable Life Assurance Society of the U. S., located at New York, in the State of New York, has appointed I. Layton Register of Philadelphia, as its Agent and Attorney in this State, on whom process of law can be served, and filed in this Department a certified copy of its charter and a detailed statement of its Assets and Liabilities, and otherwise complied with the Requirements of an Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act to establish an Insurance Department," approved the 4th day of April, A. D. 1873:

Now Therefore, I, David Martin, Insurance Commissioner of the State of Pennsylvania, in pursuance of the Act aforesaid, do hereby certify that the Equitable Life Assurance Society of the U. S. is hereby authorized and empowered by its said Agent or Attorney and by the several Agents appointed and duly commissioned in accordance with the eleventh section of said Act of Assembly, to transact the business of Insurance for the year ending March 31, 1909, in the State of Pennsylvania according to the terms of its charter and in conformity to the laws of said State.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal of the Insurance Department, State of Pennsylvania.]

DAVID MARTIN,
Insurance Commissioner.

38 EXHIBIT D.

(Copy.)

Form E. No. 1.

Commonwealth of Pennsylvania.

Insurance Department.

HARRISBURG, PA., April 1st, 1909.

Whereas, The Equitable Life Assurance Society of the U. S., located at New York, in the State of New York, has appointed I. Layton Register of Philadelphia, as its Agent and Attorney in this

State, on whom process of law can be served, and filed in this Department a certified copy of its charter and a detailed statement of its Assets and Liabilities, and otherwise complied with the Requirements of an Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act to establish an Insurance Department," approved the 4th day of April, A. D. 1873:

Now Therefore, I, David Martin, Insurance Commissioner of the State of Pennsylvania, in pursuance of the Act aforesaid, do hereby certify that the Equitable Life Assurance Society of the U. S. is hereby authorized and empowered by its said Agent or Attorney and by the several Agents appointed and duly commissioned in accordance with the eleventh section of said Act of Assembly, to transact the business of Insurance for the year ending March 31, 1910, in the State of Pennsylvania according to the terms of its charter and in conformity to the laws of said State.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal of the Insurance Department, State of Pennsylvania.]

DAVID MARTIN,
Insurance Commissioner.

39 EXHIBIT E.

(Copy.)

Form E. No. 1.

Commonwealth of Pennsylvania.

Insurance Department.

HARRISBURG, PA., April 1st, 1910.

Whereas, The Equitable Life Assurance Society of the U. S., located at New York, in the State of New York, has appointed I. Layton Register of Philadelphia, as its Agent and Attorney in this State, on whom process of law can be served, and filed in this Department a certified copy of its charter and a detailed statement of its Assets and Liabilities, and otherwise complied with the Requirements of an Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act to establish an Insurance Department," approved the 4th day of April, A. D. 1873:

Now Therefore, I, Samuel W. McCulloch, Insurance Commissioner of the State of Pennsylvania, in pursuance of the Act aforesaid, do hereby certify that the Equitable Life Assurance Society of the U. S., is hereby authorized and empowered by its said Agent or Attorney and by the several Agents appointed and duly commissioned in accordance with the eleventh section of said Act of Assembly, to transact the business of Insurance for the year ending March 31, 1911, in the State of Pennsylvania according to the terms of its charter and in conformity to the laws of said State.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal of the Insurance Department, State of Pennsylvania.]

SAMUEL W. McCULLOCH,
Insurance Commissioner.

40 EXHIBIT F.

(Copy.)

Form E. No. 1.

Commonwealth of Pennsylvania.

Insurance Department.

HARRISBURG, PA., April 1st, 1911.

Whereas, The Equitable Life Assurance Society of the U. S., located at New York, in the State of New York, has appointed I. Layton Register of Philadelphia, as its Agent and Attorney in this State, on whom process of law can be served, and filed in this Department a certified copy of its charter and a detailed statement of its Assets and Liabilities, and otherwise complied with the Requirements of an Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act to establish an Insurance Department," approved the 4th day of April, A. D. 1873:

Now therefore, I, Samuel W. McCulloch, Insurance Commissioner of the State or Pennsylvania, in pursuance of the Act aforesaid, do hereby certify that the Equitable Life Assurance Society of the U. S., is hereby authorized and empowered by its said Agent or Attorney and by the several Agents appointed and duly commissioned in accordance with the eleventh section of said Act of Assembly, to transact the business of Insurance for the year ending March 31, 1912, in the State of Pennsylvania according to the terms of its charter and in conformity to the laws of said State.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal of the Insurance Department, State of Pennsylvania.]

SAMUEL W. McCULLOCH,
Insurance Commissioner.

41 EXHIBIT G.

Statutary Standard Provisions.

The Equitable Life Assurance Society (Engraving) of the United States.

Henry Baldwin Hyde, Founder, July 26, 1859.

Number, —. Amount —.

Hereby insures the life of John Doe (hereinafter called the Insured) and agrees to pay at its home office in the city of New York —— —— to —— —— beneficiar —— (with —— the right on the part of the Insured to change the Beneficiary) upon receipt of due proof of the death of the Insured, provided this policy is then in force and is then surrendered properly released.

There are no restrictions under this policy on travel, residence, occupation, or military or naval service.

This policy shall be incontestable after one year from its date of issue, provided premiums have been duly paid.

42 *Annual Dividends.*

This policy shall participate annually in the distribution of the Surplus of the Society as ascertained and apportioned by it.

Dividends, at the option of the Insured (or of the assignee if any) shall in each year, on the anniversary of the register date hereof, be either—

1. Paid in Cash; or, 2. Applied toward the payment of any premium or premiums; or, 3. Applied to the purchase of paid-up Additional Insurance; or, 4. Left to accumulate at 3 per cent., compounded annually, and payable at the maturity of this policy, but withdrawable at any anniverary of its register date.

Unless the Insured (or the assignee if any) shall elect one of the foregoing options within three months after the mailing by the Society of a written notice requiring such election, the dividend shall be applied to the purchase of paid-up Additional Insurance (Option 3). This Additional Insurance may be surrendered at any time for the amount of the original Cash Dividend.

1201—11, 1. Ord. Life.

Amount of Insurance Payable at Death. Premiums Payable During Life. Annual Dividends.

Second Page.

Beneficiary. If the right to change the beneficiary has been reserved, and there is no written assignment of this policy on file with

the Society, the Insured may from time to time during its continuance, change the beneficiary or beneficiaries by a written request, upon the Society's blank, filed at its Home office, but such change shall take effect only upon the endorsement of the same hereon by the Society.

If there be no beneficiary surviving at the death of the Insured, the proceeds of this policy shall be payable to the executors, administrators or assigns of the Insured.

Assignments. No assignment of this policy shall be binding upon the Society unless in writing and until filed at its home office. The Society assumes no responsibility for the validity of any assignment.

Reinstatement. If this policy shall lapse in consequence
43 of the non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Society, and the payment of all overdue premiums, with interest at 5 per cent. per annum, and upon the payment, or reinstatement of any indebtedness to the Society, secured by this policy, with interest at the same rate.

Age. The amount of insurance payable under this policy, if the age has been misstated, shall be the amount which the premium charged would have purchased at the Society's rates in use at the register date hereof, for the Insured's correct age.

The contract. This policy constitutes the entire contract between the parties hereto.

Self-destruction, sane or insane, within one year from the date of issue hereof, is a risk not assumed by the Society under this policy.

Agents are not authorized to modify, or in event of lapse, to reinstate this policy, or to extend the time for payment of any premium or instalment thereof.

Premiums.

This insurance is granted in consideration of the payment in advance of — and of the payment — thereafter — upon each — day of — until the death of the Insured.

Payment. All premiums are payable in advance at the Home office, or to any Agent or Agency Cashier of the Society, upon delivery on or before their due date, of a receipt signed by an executive officer of the Society (the President, a Vice-President, Secretary, Assistant Secretary, Comptroller, Deputy Comptroller, Treasurer, or an Assistant Treasurer) and countersigned by said Agent or Agency Cashier. This policy is based upon the payment of premiums annually; but, premiums may be paid, subject to the Society's written approval, in semi-annual or quarterly instalments at the Society's adopted rates for fractional premiums, provided that in the event of the death of the insured any unpaid portion of the premium for the then current policy year shall be deducted from the amount of the death claim payable hereunder.

Grace. A grace of thirty-one days, subject to an interest charge at the rate of 5% per annum, will be granted for the payment of

every premium after the first, during which period the insurance hereunder shall continue in force. If death occur within the days of grace, the premium for the then current policy year or any unpaid instalments thereof shall be deducted from the amount payable hereunder.

44 Except as herein expressly provided, the payment of any premium or instalment thereof shall not maintain this policy in force beyond the date when the succeeding premium or instalment thereof becomes payable.

Table of Loan and Surrender Values per $1,000 *of Insurance.*

As this policy is for — the value will be — those stated below.

The term for which extended insurance will be granted remains the same without regard to the amount of the policy.

After policy has been in force.	Loan and Cash Value.	Paid-up Extended Term Insurance. Years	Months.	Paid-up Life Insurance.
3 Years	$.....	.....	.....	$.....
4 "	$.....	.....	.....	$.....
5 "	$.....	.....	.....	$.....
6 "	$.....	.....	.....	$.....
7 "	$.....	.....	.....	$.....
8 "	$.....	.....	.....	$.....
9 "	$.....	.....	.....	$.....
10 "	$.....	.....	.....	$.....
11 "	$.....	.....	.....	$.....
12 "	$.....	.....	.....	$.....
13 "	$.....	.....	.....	$.....
14 "	$.....	.....	.....	$.....
15 "	$.....	.....	.....	$.....
16 "	$.....	.....	.....	$.....
17 "	$.....	.....	.....	$.....
18 "	$.....	.....	.....	$.....
19 "	$.....	.....	.....	$.....
20 "	$.....	.....	.....	$.....
21 "	$.....	.....	.....	$.....
22 "	$.....	.....	.....	$.....
23 "	$.....	.....	.....	$.....
24 "	$.....	.....	.....	$.....
25 "	$.....	.....	.....	$.....
30 "	$.....	.....	.....	$.....

These values are exclusive of dividend additions, and are for completed policy years. They will be reduced, if there is any indebtedness hereon.

If there are any dividend additions to this policy, these values will be increased thereby.

The loan obtainable at the end of any given year may be secured during that year, if the premium for the entire year has been paid.

Values for later years will be on the same basis, and will be furnished on request.

45 *Provisions Relating to the Foregoing Table.*

Loans. At any time, while this policy is in force, after three full years' premiums have been paid, the Society will advance on proper assignment and delivery of this policy, and on the sole security hereof a sum not exceeding the loan value at the end of the then current policy year as stated in the above Table (increased by the cash value dividend additions to this policy if any) less any indebtedness to the Society hereon, provided all premiums or instalments of the same have been fully paid. Interest at the rate of 5% per annum shall be payable in advance upon such loan to the end of the then current policy year, and annually in advance thereafter at the same rate. Unless the loan is for the purpose of paying premiums due the Society, the granting of the same may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay such loan or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the Insured, and to the assignee of record if any, to their addresses last known to the Society.

Option on Surrender or Lapse. After three full years' premiums have been paid hereon, upon any subsequent default in the payment of any premium or instalment thereof, and within three months after such default, this policy may be surrendered by the Insured (or assignee if any) who may elect one of the following options:

(*a*) To receive the Cash Surrender value of this policy, the payment of which may be deferred by the Society for a period not exceeding ninety days after the receipt of the application therefor; or

(*b*) To continue the insurance for its face value (and any outstanding dividends additions) as paid-up extended term insurance for the period shown in the above Table, or for such further period, as the dividend additions (if any) will purchase, but without future participation, or right to loan; or

(*c*) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

In the event of default in the payment of any premium or instalment thereof after this policy has been in force three full
46 years, if the Insured (or assignee if any) does not select one of said options within three months of such default, the insurance shall be continued as provided under Option (*b*).

If there be any indebtedness against this policy, the cash surrender value shall be reduced thereby, the paid-up insurance shall be reduced proportionately, and the extended term insurance shall be for the face value of the policy less the indebtedness and for such period as the reduced cash value will purchase.

Basis of Computation. The values stated in the foregoing Table are mathematical equivalents and each is equal to the full Reserve as computed upon the American Experience Table of Mortality with 3% interest at the end of the then current policy year, less a sur-

render charge of not more than 1½% of the face of this policy until the completion of the tenth policy year at which time and thereafter there is no deduction made as a surrender charge.

Modes of Settlement at Maturity of Policy.

The Insured (or the beneficiary after the Insured's death in case the insured shall have made no election) may, be written notice to the Society at its Home office, elect to have the net sum due under this policy upon the death of the Insured, either:

Option 1. Paid in Cash; or,

Option 2. Paid in a fixed number of Annual Instalments as set forth in the following table; or,

Option 3. Converted into a fixed Income to the beneficiary for life, by the payment of a fixed amount annually for twenty years certain, said payments to be continued thereafter during said life as shown by the following table, provided that if this option be availed of, the Society will require satisfactory evidence of the age of the payee.

If Option 2 or 3 is elected, this policy must be surrendered upon its maturity and a supplementary non-participating contract issued for the purpose of carrying out said Option.

47 *Table of Instalments for Each* $1,000.

Option 2—Instalments Certain.

Option 3—Life Income.

Number of Annual Instalments.	Amount of each Instalment.	Age of Payee when Policy Matures.	Amount of each Instalment.	Age of Payee when Policy Matures.	Amount of each Instalment.
5....	$212.00	17 or under.	$40.00	47.....	$54.00
		18, 19, 20, 21.	$41.00	48, 49.....	$55.00
10....	$113.82	22, 23, 24....	$42.00	50.....	$56.00
		25, 26, 27....	$43.00	51, 52.....	$57.00
15....	$ 81.33	28, 29, 30....	$44.00	53.....	$58.00
		31, 32.....	$45.00	54, 55.....	$59.00
20	$ 65.26	33, 34.....	$46.00	56.....	$60.00
		35, 36.....	$47.00	57, 58.....	$61.00
25....	$ 55.76	37, 38.....	$48.00	59, 60.....	$62.00
		39, 40.....	$49.00	61, 62.....	$63.00
30....	$ 49.53	41	$50,00	63.....	$63.00
		42, 43.....	$51.00	64, 65, 66..	$64.00
40....	$ 42.00	44	$52.00	67, 68.....	$64.00
		45, 46.....	$53.00	69 or over.	$65.00
50....	$ 37.73				

Executed this — day of ——, 19— at the Home office of the Society in New York.

Examined by

W. A. DAY, *President.*

W. ALEXANDER, *Secretary.*
—— ——, *Registrar.*

It is not necessary for the insured or beneficiary to employ any person, firm or corporation to collect the insurance or secure any benefit under this policy. Write direct to the Society, 120 Broadway, New York, or communicate with the nearest authorized agent of the Society whose duty it is to facilitate all settlements without charge.

48 *Change of Beneficiary Register.*

NOTE.—Entries in this register are to be made only by the Society at its Home office in New York. No other entries will be recognized.

Date Endorsed.	Beneficiary.	Endorsed by—
.....	.....	.....
.....	.....	.....
.....	.....	.....

Endorsement: Statutory Standard Provisions. The Equitable Life Assurance Society of the United States, 120 Broadway, New York. Ordinary Life Policy. Amount of Insurance payable at death. Premiums payable during life. Annual Dividends. No. —. Amount $—. Age —. Premium $— Register date: ——. [Series —.] 1201—11, 1. Ord. Life.

(Endorsement:) No. 436, Com'th Docket, 1910. Commonwealth vs. The Equitable Life Assurance Society of the United States. Filed April 26, 1912. Affidavit of William A. Day, President. April 26, 1912, this affidavit directed to be filed, By the Court, McC. J. Olmsted & Stamm.

49 *Findings of Fact and Opinion of the Court of Common Pleas.*

In Dauphin County Common Pleas.

436 Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

By the COURT:

This is a consolidation, by agreement, of five separate appeals taken by the defendant from the settlements of the accounting officers of the plaintiff, charging the defendant with a two per cent. tax upon gross premiums for the years 1906, 1907, 1908, 1909 and 1910, respectively.

The case is submitted to us for decision in pursuance of the provisions of the Act of April 29th, 1874 (P. L. 109).

The aggregate amount of gross premiums upon which the tax is estimated for the years aforesaid is $4,928,306.54, and the tax claimed is $98,566.13. From the agreement of the parties it appears that all the premiums above mentioned "were paid to the defendant company, or its agents, at points outside the State of Pennsylvania, and they were all paid by persons who at the time of payment were residents of the State of Pennsylvania." The policies upon which these premiums were paid are classified, in the agreement of the parties, as follows, to wit:

1. Policies taken out outside of Pennsylvania by non-residents at the time the policies were taken out.

2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.

3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.

4. Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

The question to be determined is whether or not the Commonwealth is entitled to the tax upon the premiums paid by resi-
50 dents of the State to the defendant company, or to its agents outside the State, during the years covered by the respective settlements.

Discussion.

The persons referred to in these four classes were all residents of Pennsylvania during the years covered by the settlements in this case, and all paid their respective premiums "to the defendant company or its agents at points outside the State of Pennsylvania." All the premiums paid were renewal premiums. The Act of June 28th, 1895, P. L. 408, specifies, as the subject of the tax thereby imposed, "the gross premiums of every character and description re-

ceived from business done within this Commonwealth within the entire calendar year preceding." The business of the defendant company in the insurance of human life in consideration of premiums paid therefor. The insurance contract is generally known as policy, and the contract is complete when the policy, and the contract ic complete when the policy is delivered and the first premium paid. The contract may, at the option of the insured, be continued from year to year by payment at the proper time of the stipulated premium. The business of the defendant company is done when the policy is issued, and it is not required to do anything further until the contingency happens which matures the policy. The insured must be the actor or do with respect to the payments necessary to prevent a forfeiture of his rights under the contract. The tax is imposed upon premiums "received from business done within the Commonwealth" and within the year. Is the voluntary payment of a premium by a policyholder, to protect his rights under the contract, and its receipt by the defendant a premium received by the company from business then done, or is its receipt from business previously concluded? The Commonwealth and the defendant in their previous settlements have regarded such payments as
51 "premiums received from business done" within the meaning of the statute, and we therefore need not discuss it further.

The receipts issued for the premiums covered by the settlements here were issued outside the State. Is this business done "within the Commonwealth" according to the meaning of the taxing statute? Is it be business done by the defendant company, it seems clear that it was not done within the Commonwealth, unless the premium so received should in law be considered as inseparably connected with "business previously done in the State," so as to make the receipt of the renewal premium an essential and necessary part of such business.

As already stated, the ordinary corporate business of the defendant company is the making of insurance contracts, and the issuing of policies evidencing such contracts.

With respect to the first class of policies, to wit, policies taken out outside of Pennsylvania by non-residents, the making of the contracts and the issuing of the policies was certainly not "business done in Pennsylvania," and the State had no concern with or interest in that business.

With respect to the second class of policies, to wit, policies taken out outside of Pennsylvania by residents of Pennsylvania, it may be said that the residents of the State were at liberty to make their contracts wherever they chose, and if made outside the State, the Commonwealth had apparently no concern therewith originally. If renewal premiums, received for continuing in force these two extra-territorial classes of contracts, are to be considered as an essential or necessary outgrowth and part of the business originally done in the making of the contracts, the plaintiff has apparently no right to tax such renewal premiums.

52 With respect to the third class of policies, to wit, policies taken out in Pennsylvania by residents of Pennsylvania, it must be admitted that the making of these contracts was done in Pennsylvania, and if renewal premiums are to be regarded as the necessary outgrowth or product of the business originally done and as part of such business, then the Commonwealth would apparently be entitled to her tax upon these renewal premiums, no matter how or where paid, if the taxing statute includes them.

With respect to the fourth class of policies, to wit, policies taken out in Pennsylvania by non-residents of Pennsylvania, these contracts were made in the State and may be properly regarded as "business done in the Commonwealth," and if renewal premiums paid thereon must be considerd as the fruitage, and an inseparable part of the business originally done, then the Commonwealth is again apparently entitled to her tax upon these premiums, if the statute so declares.

Therefore the Commonwealth has apparently no right to claim her tax upon renewal premiums received from the first and second class of policies, and has apparently a right to her tax upon the renewal premiums upon the third and fourth classes of policies, if the receipt of these renewal premiums must be regarded as part of the business originally done in the making of the insurance contracts, and if the statute covers them. The contracts are the same, and the renewal premiums simply have continued the contracts in force. The statute makes no specific reference to either original or renewal premiums, but the language, "premiums of every character and description," includes both. But the statute makes no reference to business done in previous years, and expressly limits the tax to premiums from "business done within the calendar year preceding." It can hardly be assumed that the Legislature had in mind premiums resulting or necessarily growing out of the

53 business done, or in any way connected with business done in previous years, when they have not used language clearly indicating such an intention. In the construction of a taxing statute, no burden should be imposed without "clear and unambiguous language" directing it. The tax must fall only upon such subject as is clearly designated in the statute, and in the present case premiums received from or connected with the business done in previous years is not only not designated as a subject for taxation, but is expressly excluded by the limitation to premiums received from "business done within the entire calendar year preceding."

We therefore are not called upon to consider or decide whether the premiums are in any way connected with business done in previous years. The only inquiry is whether the premiums in question were received by the defendant "from business done within the Commonwealth within the calendar year preceding" the reports.

The classification made of the policies does not appear to us to be of controlling importance. The holders of the policies when their premiums were paid, were residents of Pennsylvania when they made their respective payments, no matter where they resided when the contracts were made, nor where the contracts were concluded. These residents of Pennsylvania paid their premiums, as

they had the right to do, to the defendant company or its agencies outside the State. Upon these payments being thus made, the defendant company assented, as it was bound to do, to the continuing in force of the contracts. Was this doing business or "business done"? It is only premiums received from "business done" which are liable to the statutory tax. If there is no business done, no premiums can be received and no tax can be imposed. It is the doing of business which creates the liability to the tax, and
54 the extent of that liability is measured by the amount of premiums received therefrom. It is conceded by both parties that the acceptance of renewal premiums, thereby continuing the corporate contracts in force, is a doing of corporate business. The premiums, therefore, covered by the reports in this case were "received from business done." Was this business done within the Commonwealth? The defendant company was regularly conducting its corporate business through various agencies within the Commonwealth during all the years covered by these reports, and has paid to the Commonwealth the tax upon all premiums received from business done through such agencies for the several years covered by these reports. These payments were made for the respective years, before a license issued for the ensuing year, and the law required that payment should be so made. No demand was made at the time for the payment of anything further in either of these years, and licenses were issued without question.

Were the premiums paid by residents of Pennsylvania to agencies of the defendant outside the State, premiums received by the defendant for business "done within the Commonwealth"? The premiums were so paid because residents of Pennsylvania, for their own reasons, chose to make their payments in that way. The agencies of the defendant company outside the State and the Defendant at its New York office, received these premiums because residents of the State requested their receipt. The defendant and its agencies acted, beyond the limits of the State upon the receipt of the premiums.

The agencies in the State did not act in any way with respect to these premiums. They did not receive the premiums nor issue receipts therefor. The contention of the Commonwealth that the taxing statute "was intended to include and does include the
55 payment of premiums by residents of this Commonwealth" is conclusively answered by the fact that the statute makes no reference whatever to premiums paid by residents of the State. It refers only to "premiums received from business done within this Commonwealth" by insurance companies of other States. If the Legislature had intended to impose the tax upon premiums paid by residents of the State, it would have expressly declared such intention. The residents of the State were at perfect liberty to pay to defendant in New York, or its agencies outside the State, and the exercise of this liberty did not cause the defendant to do "any business within this Commonwealth." It may have caused some activity in defendant's offices in New York or at its agencies outside the State, but nothing was done within its borders by reason thereof.

It is true that a life insurance policy is a contract to pay a certain

sum, upon the decease of the insured to a designated beneficiary, but as defendant's policies contain no restrictions "on travel, residence, occupation or military or naval service" it cannot be successfully contended that they insure life or property in any particular state or place, and thus they differ from fire insurance policies, which cover designated property in a particular location. By the policies the defendant "agrees to pay at its home office in the City of New York" upon the happening of the contingency which matures the policy, when the stipulated proofs have been furnished. The premiums are payable annually "at the Home Office or to any agent or agency cashier." The subject of the insurance is not life or property in any particular location, but a living human being entirely free to choose and change location as often as desired. Decisions resting upon the location of property insured, in determining the place of making the insurance contract, are not controlling in the consideration of life insurance contracts,
56 although the principles upon which such decisions rest are to a certain extent applicable.

In Swing vs. Munson, 191 Pa. 582, the defendant had given his notes to an Ohio insurance company for a policy of insurance issued by it upon property located in Pennsylvania. The Ohio company had not complied with our registration laws and had no right to do business in Pennsylvania. A recovery upon the notes was not permitted, because the insurance company had not complied with our laws upon the subject of insurance of property within the State. It clearly appeared that the Ohio company had, through its agent in Pennsylvania, procured the insurance. Mr. Justice Dean at page 584 used the following language, to wit:

"Ostensibly, there was no agent of the company in this state, but before Munson made out and transmitted his application, before he even knew of the existence of the company, one Hotchkin, a resident of Elmira, called upon him in Williamsport, and suggested that he take out policies in the company. It was denied that Hotchkin was an agent for the company; he was called an inspector, but the testimony of Munson and the correspondence between him and Williams, the secretary, establishes the fact beyond dispute that he acted for the company in procuring the insurance of Munson's property in Pennsylvania, although the contract was consummated by direct correspondence between Munson at Williamsport and the officers of the company in Cincinnati."

At page 586 the learned Justice uses the following language, to wit:

"It is argued that the contract was made in the state of Ohio;
it being valid there, under the constitution of the United
57 States, it is enforceable in Pennsylvania. The evidence does not show that the contract was made in Ohio; to our minds, it shows quite the contrary."

This decision is manifestly controlled by the fact that a representative of the company had gone into Pennsylvania and had virtually procured the contract, although its final consummation was by correspondence. The conclusion seems to be fully warranted, that if nothing had been done by the representative of the Ohio

company in the State, and the application had been sent by Munson, upon his own initiative, to the company in Cincinnati, and the policy there issued and sent by mail to Williamsport, the contract would have been entirely valid, because no business had been done in Pennsylvania by the Ohio company.

The principle decided in Swing vs. Munson, supra, is still recognized as law.

In Bartlett vs. Rothschild, 214 Pa. 421, which was an attempt to hold Rothschild personally responsible for an insurance alleged to have been effected by him in a company not authorized to do business in the State, it appeared that the plaintiffs residing in Philadelphia, made application to Frank B. Hall, who sent the application to Frank B. Hall & Company, insurance brokers in New York, who in turn made application to Rothschild, the defendant, in Philadelphia, and negotiated with him for the policy, that he remitted the amount of the premium on the policy by plaintiffs' check, and that the policy was forwarded to Hall's firm in New York, and by it forwarded to the plaintiffs in Philadelphia. In concurring with the decision of the court in this case, Chief Justice Mitchell says, page 427:

"I concur in the reversal of this judgment because it should
58 have gone to the jury. But I would go further and hold that if the jury should find that the contract of insurance was made in New York, as the evidence rather tends to establish, it would be a good defense to this action."

This is a clear recognition of the principle that if insurance be effected by means of correspondence, without any agent of the insurance company acting with respect thereto within the limits of this Commonwealth, the insurance contract is not made in Pennsylvania, but at the place from which the policy issued.

In People's building, Loan and Savings Association vs. Berlin, 201 Pa. 1, a citizen of Pennsylvania executed a mortgage to a foreign building and loan association upon property in Pennsylvania. Default having been made, a scire facias was issued, and the Superior Court reversed the judgment of the Common Pleas, upon the ground "that the transaction involved an investment of part of the capital of the plaintiff company within the State of Pennsylvania, through an agency within the State, for the prosecution of the company's corporate business, in violation of the Act of April 22, 1874."

The loan association had not complied with the provisions of our Act of April 22, 1874, with reference to foreign corporations. The Supreme Court, however, reversed the judgment of the Superior Court and decided that the loan association was not doing business with its capital in Pennsylvania, that the mortgage given to secure the loan was valid, and was to be interpreted as a contract made in New York, where the association had its main office. The association had an agency in Bradford, and the court says with respect thereto (201 Pa. 6) "the most that can be said of the plaintiff is
that it had an agency at Bradford, by which its shareholders
59 in that vicinity were more conveniently enabled to do business with the home office in New York." This case seems

to warrant the conclusion that, even if the premiums here had been paid to a Pennsylvania agency of the defendant, it would not have been "doing business within the Commonwealth" by the defendant. This, however, we are not now called upon to decide.

In Allgeyer et al. vs. State of Louisiana, 165 U. S., 578, which was an action to recover a penalty for violation of a statute of Louisiana, prohibiting any person, firm or corporation from doing any act in the State for himself or for another, to effect insurance on property in the State, in any marine insurance company which had not complied in all respects with the laws of the State, Mr. Justice Peckham at pages 587-88 uses the folowing language:

"In the case before us the contract was beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made."

* * * * * * *

"In this case the only act which it is claimed was in violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It
60 was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent."

And again at page 591:

"When we speak of the liberty to contract for insurance, or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State Legislature had no right to prevent, at least with reference to the Federal Constitution."

In the present case the original contracts were all signed by the officers of the defendant company in New York, and reached the policyholders either through the mails or the hands of the agents of the defendant at the various places where the policyholders then resided. These contracts, in order to make them of value to the holders, required the payment of annual premiums to the defendant company at its home office, and the persons who held these policies were at liberty to arrange for the payment of these pre-

miums in any way satisfactory to themselves and the company. The premiums which were received by the defendant company,
61 from the residents of Pennsylvania in this case, were not paid by the residents of the State to any agency of the defendant within the State, but were transmitted, either directly to the office of the defendant company at New York or to some agency of the defendant outside the Commonwealth. The voluntary act of the policyholders in thus remitting and paying their respective premiums, was not in any sense the act of the defendant company, and the acts of the policyholders can in no sense be regarded as the act of the defendant company within the State. The defendant company transmitted the receipts for the renewal premiums to the policyholders resident in Pennsylvania, but the only act of the defendant company in this regard, was performed in the State of New York, or at some point outside the State of Pennsylvania, so that we have no hesitation in concluding that with respect to the premiums in question here, they were not received by the defendant company "from business done within the Commonwealth" of Pennsylvania within the calendar years covered by the settlements.

Numerous authorities might be cited to sustain this conclusion, but the principle seems to be so well settled that we regard further reference to decisions unnecessary.

We do not deem it necessary to specifically answer defendant's requests for findings of fact and conclusions of law, believing that the facts found and conclusions stated in this opinion are sufficient. If, however, such answers are desired, we will supply them promptly.

Other reasons are urged against the Commonwealth's right to recover, but we do not now consider them, as it is sufficient to base our decision in this case upon the ground that the premiums in question here were not received by the defendant Company, "from business done within the Commonwealth within the calendar
62 year preceding" the settlements. If they were not so received, they are not subject to the statutory tax.

We are constrained to conclude, under the undisputed facts in this case, that the premiums upon which the tax is sought to be recovered were not "premiums received from business done within the Commonwealth within the statutory year," and that the Commonwealth is not entitled to recover the taxes now claimed.

We therefore direct that judgment be entered in favor of the defendant and against the Commonwealth unless exceptions be filed within the time limited by law.

SAM'L J. M. McCARRELL, *J.*

(Endorsement:) 436 Comm'lth Docket, 1910. Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States. Opinion. Filed April 26th, 1912.

Commonwealth's Exceptions.

In the Court of Common Pleas of Dauphin County.

No. 436. Commonwealth Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

1. The learned Court erred in concluding as follows:
"We are constrained to conclude, under the undisputed facts in this case, that the premiums upon which the tax is sought to be recovered were not 'premiums received from business done within the Commonwealth within the statutory year,' and that the Commonwealth is not entitled to receive the taxes now claimed."
2. The learned Court erred in directing judgment to be entered in favor of the defendant and against the Commonwealth, as follows:
"We therefore direct that judgment be entered in favor of the defendant and against the Commonwealth, unless exceptions be filed within the time limited by law."

WM. M. HARGEST,
Ass't Deputy Attorney General.

And now, April 29, 1912, the foregoing exceptions are overruled, & judgment directed to be entered in accordance with opinion filed. Exceptions noted for the Commonwealth.
By the Court:

SAM'L J. M. McCARRELL, *J.*

63 (Endorsement:) No. 436, Com'th Docket 1910. Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States. Filed April 29, 1912. Exceptions for the Commonwealth.

Defendant's Exceptions.

In the Court of Common Pleas of Dauphin County.

No. 436. Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

The above-entitled case being a consolidation, by agreement of the parties, of Nos. 436, 437, 438 and 439, Commonwealth Docket, 1910, and No. 83, Commonwealth Docket, 1911, and having been tried by the Court without a jury under the provisions of the Act

of April 22, 1874 (P. L. 109), defendant submits the following exceptions, viz:

1. The learned Court erred in not finding that defendant has paid into the State Treasury of Pennsylvania the tax of two per centum upon all premiums received from business transacted by it within the State of Pennsylvania during the years 1906, 1907, 1908, 1909, and 1910, the amounts thus paid having been $87,862.14 for the year 1906; $86,652.24 for the year 1907; $88,874.68 for the year 1908; $93,190.76 for the year 1909; and $97,743.39 for the year 1910.

2. Under date of May 25, 1911, the parties hereto entered into an agreement as to certain facts, which agreement was offered in evidence and is part of the record. There was also offered in evidence, and it is part of the record, the affidavit or deposition of William A. Dry, President of defendant company, dated September 21, 1911, the facts stated and testified to in which are in no way disputed or controverted. The learned Court erred in not finding the facts to be as stated in said agreement and deposition.

OLMSTED & STAMM,
Attorneys for Defendant.

April 29, 1912.

The within exceptions are sustained, and we now find the facts to be as specifically set forth in the said exceptions respectively, and in the agreement as to facts therein referred to, and the deposition of W. A. Day, president of defendant.

By the Court:

SAM'L J. M. McCARRELL, *J.*

(Endorsement:) No. 436, Com'th Docket 1910. Commonwealth of Pennsylvania vs. The Equitable Life Assurance Society of the United States. Defendant's Exceptions. Filed May 1, 1912.

64 *Docket Entries.*

In the Supreme Court of Pennsylvania in and for the Middle District. No. 23. May Term, 1912.

No. 436. Commonwealth D'k't, 1910.

COMMONWEALTH OF PENNSYLVANIA, Appellant,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Appeal from the Court of Common Pleas for the County of Dauphin.

April 30, 1912. Appeal and affidavit filed.
" " " Eo die exit writ r-t-ble 21st Monday of the year 1912.
May 18, " Assignments of Error filed.
" " " Record filed.
" 20, " Argued.

Feb. 24, 1913. Judgment reversed and record remitted that judgment may be entered in the Court below for the balance due to Commonwealth in accordance with settlement made by accounting officers.
" " " Dissenting opinion filed by Brown, J., concurred in by Fell, C. J.
March 6, " Record remitted to Prothonotary.
" 25, " Petition for reargument filed.
" 29, " Upon consideration of the within petition, the prayer thereof is refused.

Per Curiam.

True copy from the record.
In Testimony Whereof, I have hereunto set my hand and the seal of said Court, at Harrisburg this 20th day of September, 1913.
[SEAL.] (S'g'd) WILLIAM PEARSON,
Prothonotary.

(Endorsement:) No. 23, May Term, 1912. Supreme Court. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Insurance Society of the United States.

65 *Affidavit and Appeal.*

In the Supreme Court of Pennsylvania for the Middle District.

In the Court of Common Pleas of the County of Dauphin, of Commonwealth Docket, 1910.

No. 436.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,
—
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

Enter Appeal on behalf of Commonwealth of Pennsylvania from the judgment of the Court of Common Pleas of the County of Dauphin.
To William Pearson, Proth'y Sup. Ct. Middle District.
JOHN C. BELL,
Attorney General,
By GUY H. DAVIES,
Chief Clerk.

STATE OF PENNSYLVANIA,
County of ——, ss:

—— —— being duly — saith that the above Appeal is not intended for delay, but because — firmly believes that — suffered injustice by the — from which — desires to appeal.
Sworn and subscribed before me this — day of —— A. D. 190—.
—— ——.

(Endorsed:) No. 23, May Term, 1912. Supreme Court of Pennsylvania, Middle District. Appeal and affidavit. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. John C. Bell, Atty. Gen'l, Attorney for Appellant. —— —— Attorney for Appellee. Filed in Supreme Court Apr. 30, 1912, Middle District.

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, sct:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Appeal and Affidavit in the case of Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States at No. 23 of May Term, 1912, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 23rd day of September in the year of our Lord One Thousand Nine Hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania.]

WILLIAM PEARSON,
Prothonotary.

(Endorsed:) No. 23. May Term, 1913. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. Certificate.

66 *Writ of Certiorari from the Supreme Court of Pennsylvania.*

MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

[Seal of the Supreme Court of Pennsylvania.]

The Commonwealth of Pennsylvania to the Justices of the Court of Common Pleas for the County of Dauphin, Greeting:

We being willing, for certain causes, to be certified of the appeal of Commonwealth of Pennsylvania from the judgment of said Court in the case wherein the said Appellant is Plaintiff and Equitable Life Assurance Society of the United States, Defendant, to 436 Commonwealth Docket, 1910, before you or some of you depending, do command you, That the record and Proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court, at a Supreme Court to be holden at Harrisburg, in and for the Middle District of said Commonwealth, on the 21st Monday of the

year 1912, being the 1st Monday of the Term, so full and entire as in our Court before you they remain, you certify and send together with this writ; that we may further cause to be done thereupon, what of right and according to our laws of the said State ought.

Witness, The Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our Supreme Court, at Harrisburg, the 30th day of April, in the year of our Lord, one thousand nine hundred and twelve, and of the Commonwealth the 136th.

HOMER HUMMEL STRICKLER,
Deputy Prothonotary.

The Record and process, with all things touching the same, so full and entire as before us, they remain to the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Middle District, we certify and send as within we are commanded.

SAM'L J. M. McCARRELL, *J.* [L. S.]

(Endorsement:) 436 Comth. Dk. 1910. No. 23, May Term, 1912. Supreme Court, Middle District. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. Certiorari to the Court of Common Pleas for the County of Dauphin. Returnable the 21st Monday of the year 1912. Filed in Supreme Court, May 18, 1912, Middle District. "Rule on the appellee to appear and plead on the return day of the writ." N. B.—12 days' notice, to the parties or their Counsel below necessary to compel an appearance. Filed Apr. 30, 1912.

67 *Assignments of Error.*

In the Supreme Court of Pennsylvania, Middle District, No. 23, May Term, 1912.

COMMONWEALTH OF PENNSYLVANIA, Appellant,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellee.

1. The learned court erred in overruling the Commonwealth's first exception, which exception and ruling thereon are as follows:

"1. The learned Court erred in concluding as follows: 'We are constrained to conclude, under the undisputed facts in this case, that the premiums upon which the tax is sought to be recovered were not' premiums received from business done within the Commonwealth within the statutory year,' and that the Commonwealth is not entitled to receive the taxes now claimed.' "

"The foregoing exception is overruled. Exception noted for the Commonwealth."

2. The learned Court erred in overruling the Commonwealth's second exception, which exception and ruling thereon are as follows:

"2. The learned Court erred in directing judgment to be entered in favor of the defendant and against the Commonwealth, as follows: 'We therefore direct that judgment be entered in favor of the defendant and against the Commonwealth, unless exceptions be filed within the time limited by law.' "

"The foregoing exception is overruled. Exception noted for the Commonwealth."

3. The learned Court erred in directing judgment in favor of the defendant.

4. The learned Court erred in not directing judgment in favor of the Commonwealth.

WM. M. HARGEST,
Assistant Deputy Attorney General.
JOHN C. BELL,
Attorney General.

(Endorsed:) No. 23, May Term, 1912. Commonwealth of Pennsylvania, Appellant, vs. The Equitable Life Assurance Society of the United States, Appellee. Assignments of Error. Filed in Supreme Court May 18, 1912. Middle District.

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Assignments of Error in the case of Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States at No. 23 of May Term, 1912, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript
68 from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 23rd day of September, in the year of our Lord One Thousand Nine Hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania.]

WILLIAM PEARSON,
Prothonotary.

(Endorsed:) No. 23, May Term, 1912. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. Certificate.

69 *Majority Opinion of the Supreme Court of Pennsylvania.*

Appeal from Judgment of Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA, Appellant,
v.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

In the Supreme Court of Pennsylvania for the Middle District, No. 23, May Term, 1912.

Opinion.

POTTER, *J.*:

The Act of June 28, 1895, P. L. 408, Sec. 1, provides that "Hereafter the annual tax upon premiums of insurance companies of other states or foreign governments, shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this commonwealth within the entire calendar year preceding." The Equitable Life Assurance Society of the United States, whose home office is in New York, transacts business in Pennsylvania. From a deposition of its President, made part of the record in this case, by agreement, it appears that the Society does business in all the States of the Union except two, and that in each State where it does business it is licensed under the laws thereof, and in all of the States save one, in which it is licensed, the laws require it to pay a tax upon premiums. The business transacted by the Society is the soliciting of insurance on lives by means of agents, and the issuing and renewing of policies of insurance, and collecting premiums thereon. In the State of Pennsylvania the Society maintains three so-called cashier agencies, one at Philadelphia, one at Pittsburgh, and one at Allentown, and in each of said agencies there is a cashier whose business it is to receive renewal premiums. It seems, however, that the premiums for insurance written and maintained upon the lives of residents of Pennsylvania, are not all paid to these agencies in Pennsylvania. Some of them are sent to the home office in New York, or are paid to the Society through agencies outside the State of Pennsylvania. In making up its returns for taxation for the years 1906 to 1910 inclusive, the Society did not include these premiums paid by residents of Pennsylvania for insurance upon their lives, which were sent to points outside the State. The accounting officers of the Commonwealth made a settlement of the amount due for taxes during the years in question, in which they claimed the tax upon all premiums received by the Society from the business of life insurance done within the Commonwealth, no matter whether the premium therefor was paid to an officer within or without the State. From the settlements thus made, the Society appealed to the Court of Common Pleas of Dauphin County, contending that it was

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liable only for the tax upon premiums paid to an agency within the State; and, having paid these, it was not liable for anything further. By stipulation between the parties, a trial by jury was waived, and the case was tried before a court under the provisions of the Act of April 22, 1874, P. L. 109. The trial judge sustained the contention of the Society, and held that it was subject to taxation only upon premiums paid to an agency within the State, and directed judgment to be entered, subject to exception, for the defendant, and against the Commonwealth. Exceptions were filed, which were overruled, by the Court below, and judgment was ordered to be entered, in accordance with the opinion of the trial judge. The Commonwealth has appealed, and assigns for error the dismissal of its exception, and the order directing judgment to be entered for the defendant.

In order to determine the question in controversy we must ascertain the source of the premiums which were paid to agencies outside the State. If they were received by the Society from business done within the Commonwealth, then they were subject to the tax. If they did not come from such business they were not subject to the tax. What then is the meaning of the words "business done within this Commonwealth" as used in the statute taxing gross premiums of every character and description, received from such business? Manifestly the business in which the Society is engaged is that of insuring lives; that is, is furnishing protection to the beneficiaries named in the policies against loss from the death of the insured, to the amount designated in the policy. Furnishing this protection is
the business to be done by the Society within this Common-
71 wealth, as contemplated by the statute, which fixes the
amount of the tax which it, as an insurance company organized under the laws of another state, is to pay for the privilege of entry and doing business within this Commonwealth, and with our people, its residents. The Court below seems to have unduly narrowed its inquiry, and contented itself with asking whether the mere receipt of premiums at an outside office, was doing business within this Commonwealth. Certainly not, if that was all there was to it. But the answer to that question is not at all decisive of the real inquiry here. The defendant Society does not exist merely for the collection of premiums; that is a mere incident to the great and beneficent purpose for which it exists. When it comes within our borders to do business, it renders a service; it furnishes protection and indemnity to its beneficiaries, residents of the State of Pennsylvania. That is the business which it does in Pennsylvania, and that is the purpose for which it seeks and is granted permission to enter. Furnishing that service, that insurance against loss, it makes a proper charge to cover the cost of the service which it renders, and that charge is the premium. It is simply payment for the valuable service it renders. Whether that service be paid for on the spot where the service is rendered, or whether the amount be remitted to the home office, does not change the character of the business done, and for which recompense or payment is made. If it happens to be made to an agency in Pennsylvania the defendant Society admits

without question that it is received from business done within this Commonwealth, and is subject to the tax. How can the fact, or the character, of the business done for the benefit of residents of Pennsylvania, be altered or affected in any way, by the manner in which, or the place where, the payment for the business done and the service rendered, is made? Clearly it cannot be so affected. If the Society was merely engaged in collecting premiums, without regard to the business or service for which those premiums were paid, there would be force in the suggestion that premiums collected outside the State do not constitute doing business within the State. But when we reflect that the tax is placed upon the amount of the
72 premium merely as a measure of the volume of insurance business done within the State, it is apparent that determining the place where the premium is received is not the proper test to apply in order to ascertain what that business was, or in what it consisted.

The suggestion is made in the opinion of the trial judge that the business of the Society is completed when the policy is issued, and the first premium paid. This is a mistake. Renewal premiums must be paid from year to year in most cases, to keep the policy alive. Unless they are paid, the service rendered, the insurance furnished comes to an end. In so far as the statute is concerned, the payment of each year's premium stands upon its own footing. It is payment for the insurance furnished, the business done during the current period. The taxing statute makes no difference between the first premiums and renewal premiums. The tax is to be paid upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year.

In considering the question here involved, but little aid can be obtained from the decisions as to what constitutes "doing business" in the State, within the meaning of the statute requiring foreign corporations to register before doing business here. That is an entirely different question. In the present case, the defendant Society was authorized to do business in this State, and it transacted a very large amount of insurance business upon which the tax was admittedly due. The only question here is as to the amount of the tax. For precisely the same service, rendered to residents of this State, in the one case where payment for that service is made to an agency in Pennsylvania, it admits its liability to the tax; but where a payment is made outside the State, it denies liability. We see no ground for any such distinction. Under the statute the test is in the source of the premiums. If they arose from, or in other words, were payment for, business *does* within this Commonwealth, they are subject to the tax, without regard to the location of the agency to which they may be paid.

73 The assignments of error are sustained. The judgment of the court below is reversed, and the record is remitted that judgment may be entered in the court below for the balance due to the Commonwealth in accordance with the settlement made by the accounting officers.

Opinion filed February 24, 1913.

74 COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Majority opinion in the case of Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States at No. 23 of May Term, 1912, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 25" day of February in the year of our Lord One Thousand Nine Hundred and thirteen.

[SEAL.] WILLIAM PEARSON,
Prothonotary.

(Endorsement:) 906. No. 23 May Term, 1912. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. Majority Opinion. Certificate.

75 *Dissenting Opinion of the Supreme Court of Pennsylvania.*

May Term, 1912.

No. 23.

COMMONWEALTH OF PENNSYLVANIA, Appellant,
v.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Appeal from C. P., Dauphin.

BROWN, *J.:*

I would affirm this judgment on the well-considered opinion of the court below. The tax which the commonwealth may collect upon insurance premiums under the act of 1895 is upon those "received from business done within this commonwealth within the entire calendar year preceding." I am at a loss to understand how it can be held that this includes premiums paid at the home office in New York, in accordance with the terms of policies which were issued to non-residents outside of the state. If the legislature had intended that the act of 1895 was to include them, it would have then so declared, instead of waiting until 1911 to do so, when, by the act of June 1, 1911, P. L. 607, sec. 16, it provided that "Every

insurance company or association of another state or foreign government authorized to do business in this commonwealth, shall make report to the Insurance Commissioner, on or before March first of each year, under oath of its president or secretary, showing the entire amount of premiums of every character and description received from business transacted in the commonwealth during the year, or fraction of year, ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, or whether the same were collected in this commonwealth or elsewhere, and pay into the state treasury the requisite tax upon all such premiums." I feel that what is true of the first class of policies is equally so of each of the other three classes, the premiums upon which the commonwealth would tax under the act of 1895.

FELL, C. J., concurs in this dissent.

Opinion filed February 24, 1913.

76 COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, set:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Dissenting Opinion in the case of Commonwealth of Pennsylvania vs. Equitable Life Assurance Society of the United States, at No. 23 of May Term, 1912, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Harrisburg, in the County of Douphin, in the said Middle District of Pennsylvania, this 25" day of February in the year of our Lord One Thousand Nine Hundred and thirteen.

[SEAL.] WILLIAM PEARSON,
Prothonotary.

(Endorsement:) 907. No. 23, May Term, 1912. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. Dissenting Opinion. Certificate.

77 *Petition of the Equitable Life Assurance Society of the United States for a Reargument of the Case.*

In the Supreme Court of Pennsylvania, Middle District, May Term, 1912.

No. 23.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff and Appellant,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant and Appellee.

Appeal from the Judgment of the Court of Common Pleas of Dauphin County, Entered to No. 436, Commonwealth Docket, 1910.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

The Equitable Life Assurance Society of the United States, Defendant and Appellee in the above-entitled case, respectfully petitions and moves Your Honorable Court to grant a reargument thereof, and, in support of its said petition and motion, very respectfully represents:

That the decision of the Court will result in double taxation, in this way: The Act of June 28, 1895 (P. L. 408), supplementary to "An Act to provide revenue by taxation," approved June 7, 1879, (P. L. 112), enacts—

78 "That hereafter the annual tax upon premiums of insurance companies of other states or foreign governments, shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding."

The other States have laws substantially the same.

It has always been held that when an insurance company effects insurance, or the renewal of insurance, and receives the premium therefor through its agency in any given State, it is doing business in that State, no matter where the person may reside upon whose life the policy is issued. If, when the policy-holder resides in a State other than that in which the business is transacted, the company is to be taxed in that State also upon the same premium, double taxation results upon the same premiums and in respect to the same insurance policies.

Residents of New Jersey, Maryland and Delaware frequently obtain their insurance, or transact their business in relation thereto, at the agency of the Equitable Company in Philadelphia. Residents in West Virginia and Ohio similarly transact business at agencies of the Equitable in Pittsburgh.

This case was tried in the Court below without a jury, and the trial judge found as a fact—

"that the defendant has paid into the State Treasury of Pennsylvania the tax of two per centum upon all premiums received from business transacted by it within the State of Pennsylvania during the years 1906, 1907, 1908, 1909 and 1910, the amounts thus paid having been $87,862.14 for the year 1906; $86,652.24 for the year 1907; $88,874.68 for the year 1908; $93,190.76 for the year 1909; and $97,743.39 for the year 1910." (See Paper Book of Appellee.) (The Commonwealth's Paper book in this case inadvertently omitted a large and important portion of the record.)

This suit was brought to recover tax upon premiums received from business transacted outside of Pennsylvania in respect of insurance upon lives of persons who were, within the year, residents of Pennsylvania, although many of them were not such residents when the policies were taken out.

The decision appears based upon the proposition that, no matter where the insurance was affected, or the premiums paid, the business done is that of affording indemnity and protection to resi-
79 dents of Pennsylvania. It is the contention of your Petitioner that the statute does not consider the amount of protection or the residence of the protected person, but does consider the place where the business was done within the year for which the tax is charged and the premiums derived from that business. It has been repeatedly held by this Court that, while a fire insurance policy is, a life insurance policy is not, a contract of indemnity at all. But, even if it were, the persons whose lives are the objects of the insurance could not be said to be protected by the policies, but only the persons named in the policies as beneficiaries and to whom the policies are made payable. (See form of Policy, "Exhibit G," Appellee's Paper Book, p. 62). It matters not where the person whose life is insured may live or may die, the policy is payable only to the beneficiary, who is in the same position as he would be if he held the company's promissory note.

There is no evidence whatever as to the residence of all or any of the beneficiaries named in the policies from which the premiums in suit were derived; and, as the policies of Classes 1 and 4 were all taken out originally by persons who were non-residents at the time, there can be no presumption, legal or otherwise, that the beneficiaries are resident of Pennsylvania.

In each one of its appeals to the Court of Common Pleas of Dauphin County, from the accounts in suit, The Equitable Life Assurance Society of the United States specified the following objections:

"3. The said account is erroneous, illegal, and void because it included tax upon gross premiums which were paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania, and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28, 1895, (P. L. 408), nor by any other Act of Assembly, or, if it is, the said Act is unconstitutional and void because in violation

of section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'"

80 "4. The account hereby appealed from is erroneous, illegal, and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania, and which were never within the State of Pennsylvania. Neither the Act of June 28, 1895, (P. L. 408), nor any other Act of Assembly can be construed to impose a tax upon such premiums, or, if the said Act, or any other Act of Assembly, can be so construed, it is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits." (See page 19*a*, Commonwealth's Paper Book).

These objections do not appear to have been taken into consideration by Your Honorable Court in rendering its decision.

Your petitioner, therefore, requests an opportunity to reargue the case, and in support of its petition presents herewith its brief.

And your petitoner will ever pray.

ALEXANDER & GREEN,
THOS. DE WITT CUYLER,
M. E. OLMSTED,
A. C. STAMM,
Attorneys for Petitioner.

(Endorsed:) No. 23. May Term, 1912. In the Supreme Court of Pa. Middle District. Page 54. Commonwealth of Pennsylvania, Plaintiff and Appellant, vs. The Equitable Life Assurance Society of the United States, Defendant and Appellee. Petition for Reargument. Filed in Supreme Court Mar. 25, 1913. Middle District.

And now, March 29", 1913, upon consideration of the within petition, the prayer thereof is refused.

PER CURIAM.

81 COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, Sct.:

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District, thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Petition for Reargument and Order of Court thereon in the case of Commonwealth of Pennsylvania vs. The Equitable Life Assurance Society of the United States, at No. 23 of May Term, 1912, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in

said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 20″ day of September, in the year of our Lord One Thousand Nine Hundred and —.

[SEAL.] (Signed) WILLIAM PEARSON,
Prothonotary.

(Endorsement:) No. 23, May Term, 1912. Commonwealth of Pennsylvania, Appellant, vs. The Equitable Life Assurance Society of the United States. Certificate.

82 *Remittitur.*

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania.]

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Dauphin, Greeting:.

Whereas, by virtue of our writ of certiorari from our Supreme Court of Pennsylvania in and for the Middle District, returnable in the said Court on the 21st Monday of the year of our Lord one thousand nine hundred and twelve, a Record was brought into the same Court of a Judgment rendered against Commonwealth of Pennsylvania, Appellant, at the suit of Equitable Life Assurance Society of the United States, Appellee, and it was so proceeded in our Supreme Court that the said judgment was reversed and record remitted that judgment may be entered in the court below for the balance due to Commonwealth in accordance with settlement made by accounting officers, and the record and proceedings thereupon, and all things concerning the same were (agreeably to the directions of the Act of Assembly in such cases made and provided), ordered by the said Supreme Court to be remitted to the Court of Common Pleas for the County of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we remit you the Record of the Judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness, the Hon. D. Newlin Fell, Chief Justice of our Supreme Court at Harrisburg, the 4″ day of March, in the year of our Lord one thousand nine hundred and thirteen.

WILLIAM PEARSON, *Prothonotary.*

(Endorsement:) 436 Com'th Dk. 1910. No. 23, May Term, 1912. Supreme Court of Pennsylvania. Commonwealth of Pennsylvania, Appellant, vs. Equitable Life Assurance Society of the United States. Filed May 4, 1913. Remittitur to Dauphin County. Costs; (Paid by) Prothonotary, (Appellant) $12.00. Attorney (not paid) -3.00. Amount $15.00.

83 In the Court of Common Pleas of Dauphin County.

No. 436. Com'th Docket, 1910.

COMMONWEALTH OF PENNSYLVANIA
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

And now, August 12, 1913, it appearing from the record that the five appeals taken by The Equitable Life Assurance Society of the United States from settlements made by the Auditor General and State Treasurer of the State of Pennsylvania from accounts settled for tax on gross premiums for the years 1906, 1907, 1908, 1909 and 1910, being entitled Nos. 436, 437, 438 and 439, Commonwealth Docket, 1910, and No. 83, Commonwealth Docket, 1911, respectively, were consolidated and tried as one case to No. 436, Commonwealth Docket, 1910; and it further appearing that the Supreme Court of the State of Pennsylvania, on February 24, 1913, in the appeal taken by the Commonwealth of Pennsylvania to said Court, entitled *to* No. 23, May Term, 1912, reversed the judgment of the Court of Common Pleas of Dauphin County and directed that "The judgment of the Court below is reversed and the record is remitted, that judgment may be entered in the Court below for the balance due the Commonwealth in accordance with the settlement made by the accounting officers," judgment is now entered against the above-named defendant, The Equitable Life Assurance Society of the United States of America, for the sum of $115,253.89, made up as follows, viz:

Tax	$98,566.13
Interest at 6% on $81,030.40 from November 20, 1910, being 60 days after the date of settlements made for that amount to August 12, 1913	13,261.98
Interest on $17,535.73 from April 22, 1911, being 60 days after the date of settlement for that amount, to August 12, 1913	2,425.78
Attorney General's Commission of 5% on $10,000	500.00
Attorney General's Commission on amount in excess of $10,000, as fixed by the Court pursuant to the Act of June 1, 1907 (P. L. 383)	500.00
Total	$115,253.89

By the Court,

GEORGE KUNKEL, *P. J.*

The correctness of the figures above given is acknowledged.

WM. M. HARGEST,
Deputy Attorney General.
OLMSTED & STAMM,
Attorneys for The Equitable Life Assurance Society of the United States.

(Endorsement:) No. 436. Com'th Docket, 1910. Commonwealth vs. The Equitable Life Assurance Society of the United States. Entry of Judgment. Filed Aug-st 12, 1913.

84 *Petition for Writ of Error.*

United States Supreme Court.

Petition for Writ of Error to the Court of Common Pleas of Dauphin County.

To the Honorable Mahlon Pitney, Justice of the Supreme Court of the United States:

The petition of the Equitable Life Assurance Society of the United States respectfully showeth:

That the petitioner is a corporation of the State of New York, authorized by its charter to do a life-insurance business, with its principal office in the City of New York;

That your petitioner transacted the business of life insurance in the State of Pennsylvania during the years 1906 to 1910, both inclusive;

That by the Act of the Pennsylvania General Assembly approved June 28, 1895, and printed in the pamphlet laws of the year 1895, at page 408, your petitioner was required to pay into the Treasury of the State of Pennsylvania a tax upon gross premiums, this Act providing as follows:

"That hereafter the amount of tax upon premiums of insurance companies of other States or foreign governments, shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding";

That, in accordance with what was, and is, by your petitioner, considered to be a proper interpretation of the above-quoted provision of the said Act of 1895, your petitioner paid into the Treasury of the State of Pennsylvania, for the years 1906 to 1910, both inclusive, taxes upon large amounts of premiums which were received from business done within that State;

That the Commonwealth of Pennsylvania, in accounts settled against your petitioner by the Insurance Commissioner of the Commonwealth and approved by the State Treasurer of the Commonwealth September 20, 1910, made claims against your peti-
85 tioner for taxes on gross premiums, in addition to those theretofore paid, for the years and in the amounts as follows, viz:

For 1906	$20,329.42
For 1907	21,015.40
For 1908	20,385.64
For 1909	19,299.94

and, in an account similarly settled and approved February 20, 1911, made a claim for an additional tax of $17,535.73 for the year 1910;

That the gross premiums with respect to which the Commonwealth in the said accounts sought to collect tax were all paid to the defendant company, or its agents, at points outside the State by persons who at the time of payment were residents of the State of Pennsylvania, the policies with respect to which the said premiums were paid being of the following four classes, as agreed upon by the parties and as found by the trial court, viz:

"1. Policies taken out outside of Pennsylvania by persons who were non-residents at the time the policies were taken out;

"2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

"3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out;

"4. Policies taken out by persons who were non-residents of Pennsylvania at the time the policies were taken out;"

That, in pursuance of the provisions of the statute in such case made and provided, your petitioner appealed from the said accounts to the Court of Common Pleas of Dauphin County, Pennsylvania, to Nos. 436, 437, 438, and 439, Commonwealth Docket, 1910, No. 83, Commonwealth Docket, 1911, in said Court, (which cases were consolidated for trial to No. 436, Commonwealth Docket, 1910), and with each of the said appeals your petitioner filed, inter alia, the following specifications of its objections to the legality of the accounts settled and the taxes claimed, viz:

"3. The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received by appellant at its office in New York. or elsewhere outside of Pennsylvania and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28th, 1895, (P. L. 408), nor by any other Act of Assembly, or, if it is, the said Act is unconstitutional and void because in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that 'No State
86 shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws' ";

"4. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania and which never were within the State of Pennsylvania. Neither the Act of June 28th, 1895, (P. L. 408), nor any other Act of Assembly can be construed to impose a tax upon such premiums, or, if the said Act or any other Act of Assembly can be so construed, it is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits";

That, prior to the trial of the case in the Court of Common Pleas of Dauphin County, an agreement in writing was entered into between the parties, as authorized by statute, whereby the case was left to the decision of the Court without the intervention of a jury, the Court to find both the facts and the law;

That, after trial and full argument the said Court of Common Pleas of Dauphin County directed judgment to be entered in favor of the defendant company and against the Commonwealth of Pennsylvania, and judgment was so entered;

That thereupon the Commonwealth of Pennsylvania took an appeal from the said judgment of the Court of Common Pleas of Dauphin County to the Supreme Court of Pennsylvania, to No. 23, May Term, 1912, of the Middle District of said Court, stating the question involved in said appeal to be whether premiums paid by residents of Pennsylvania and sent to local agents of the company outside of the State or to the home office of the company in New York, were taxable in Pennsylvania; that is, whether the State of Pennsylvania might impose taxes upon the proceeds of transactions carried on beyond its borders;

That the said case having been fully argued in the Supreme Court of Pennsylvania, that Court, February, 24, 1913, reversed the judgment of the Court of Common Pleas of Dauphin County, and held The Equitable Life Assurance Society of the United States to be subject to the taxes which the Commonwealth of Pennsylvania sought to impose upon it, and directed judgment to be entered against it accordingly;

That, subsequently, your petitioner filed a petition with the Supreme Court for a re-argument of the case, bringing to the Court's attention particularly the fact that in each of its aforesaid appeals to the Court of Common Pleas of Dauphin County it had specified the following objections to the account appealed from, and
87 that the Court did not appear to have taken these objections into consideration in rendering its decision in reversal of the trial Court, viz:

"3. The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania, and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28, 1895, (P. L. 408), nor by any other Act of Assembly, or, if it is, the said Act is unconstitutional and void because in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws' ";

"4. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere outside

of Pennsylvania, and which were never within the State of Pennsylvania. Neither the Act of June 28, 1895, (P. L. 408), nor any other Act of Assembly can be construed to impose a tax upon such premiums, or, if the said Act or any other Act of Assembly can be so construed, it is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits";

That such re-argument was refused by the Supreme Court in an order made March 29, 1913, in the following language, viz:

"And now, March 29, 1913, upon consideration of the within petition the prayer thereof is refused.

PER CURIAM."

That the Supreme Court of Pennsylvania, in which the case was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania;

That in pursuance of the mandate of the Supreme Court of Pennsylvania judgment has been entered in the Court of Common Pleas of Dauphin County against The Equitable Life Assurance Society of the United States and in favor of the Commonwealth of Pennsylvania for $115,253.89, which judgment is final;

That the judgment of the said Court, as already shown, involved the decision of a Federal question; that said decision is in favor of the validity of the State law as interpreted by the State's executive officers, and against the immunity claimed by your petitioner under the Constitution of the United States.

Wherefor- your petitioner, (presenting herewith a bond, with security, for approval), prays that a writ of error may be allowed to the Court of Common Pleas of Dauphin County, to bring up the record to the Supreme Court of the United States for
88 correction in that which violates the Constitution and laws thereof, and that the citation to the defendant may accompany the same, and will ever pray, etc.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

By Its Attorneys,

ALEXANDER & GREEN,
THOS. DE WITT CUYLER,
A. C. STAMM.

Writ of error is allowed pursuant to the foregoing petition, Aug. 22nd, 1913.

MAHLON PITNEY,
Associate Justice of the Supreme Court U. S.

(Endorsement:) In the Supreme Court of the United States. The Equitable Life Assurance Society of the United States, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Petition for Writ of Error. Filed in the Court of Common Pleas of Dauphin County, State of Pennsylvania, September 2, 1913. Lockwood B. Worden, Prothonotary. A. C. Stamm, Att'y for P*fl.* in error.

89 *Writ of Error Bond.*

Supreme Court of the United States, May Term, 1912.

No. 23.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

In Error to the Supreme Court of Pennsylvania, Middle District.

Know all men by these presents, That we, The Equitable Life Assurance Society of the United States, a corporation of the State of New York, principal, and the American Surety Company, a corporation of the State of New York, duly authorized to transact the business of indemnity and suretyship in the State of Pennsylvania, and having an office and principal place of business in the State of New York at #100 Broadway in the City of New York, surety, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of One Hundred Ninety Seven Thousand One Hundred Thirty-two and 26/100 Dollars, ($197,132.26), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated the 25th day of July, 1913.

Whereas lately in the Court of Common Pleas in and for the County of Dauphin, State of Pennsylvania, in a suit of the Commonwealth of Pennsylvania against The Equitable Life Assurance Society of the United States, for the sum of Ninety-eight Thousand Five Hundred Sixty-six Dollars and Thirteen Cents ($98,566.13), for taxes on gross premiums, judgment was rendered in behalf of the defendant, which judgment was afterward reversed by the Supreme Court of the State of Pennsylvania, in a certain plea and suit of said Court of May term, 1912, No. 23 and direction given that judgment be entered in the Court of Common Pleas of Dauphin County against the said defendant; and the said defendant,
90 The Equitable Life Assurance Society of the United States, has prosecuted, or is about to prosecute, a writ of error to the Supreme Court of the United States to reverse the judgment entered by the Supreme Court of the State of Pennsylvania.

Now the condition of this obligation is such, that if the above named The Equitable Life Assurance Society of the United States, plaintiff in error, shall prosecute its writ of error with effect, and answer all damages and costs if it shall fail to make good its plea,

then this obligation to be void, otherwise to remain in full force and virtue.

[Seal of The Equitable Life Assurance Society of the United States.]

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
By W. A. DAY, *President.*
AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. S. BOLL, *Res. Vice-President.*

[Seal of the American Surety Company of New York.]

Attest:
W. ALEXANDER, *Secretary.*

Attest:
HARRY M. BRETZ,
Res. Ass't Secretary.

Signed, sealed and delivered in the presence of
A. E. BRANDT.
ETTA R. BITTING.

Approved to operate as a supersedeas.

MAHLON PITNEY,
Associate Justice.

Washington, Aug. 22, 1913.

91 STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Before me personally came Charles S. Boll, who being duly sworn says that the American Surety Company is worth One Hundred Ninety Seven Thousand One Hundred Thirty-two and 26/100 dollars ($197,132.26) over and above all debts and liabilities.

CHAS. S. BOLL.

Sworn and subscribed to before me this 25th day of July, 1913.
[NOTARIAL SEAL.] B. F. UMBERGER,
Notary Public.

My commission expires Feb. 27, 1917.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

On this 25th day of July, 1913, before me personally appeared Charles S. Boll, Resident Vice President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resides in the city of Harrisburg; that he is the Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the within instrument; that he knew the corporate seal of said corpora-

tion; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation; that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law.

And the said Charles S. Boll further said that he is acquainted with Harry M. Bretz and knew him to be Resident Assistant Secretary of said corporation; that the signature of said Harry M. Bretz subscribed to the said instrument is the genuine handwriting of the said Harry M. Bretz and was thereto subscribed by the like order of the said board of directors and in the presence of him the said Charles S. Boll, Resident Vice President.

CHAS. S. BOLL,
Resident Vice-President.

Sworn and subscribed to before me this day and year aforesaid.
[NOTARIAL SEAL.] B. F. UMBERGER,
Notary Public.

My commission expires Feb. 27, 1917.

(Endorsement:) Supreme Court of the United States. The Equitable Life Assurance Society of the United States, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Bond. I approve of the within undertaking and of the sufficiency of the surety therein. Filed in the Court of Common Pleas of Dauphin County, State of Pennsylvania, September 2, 1913. Lockwood B. Worden, Prothonotary. A. C. Stamm, Att'y for Pl'f in error.

92 In the Supreme Court of the United States, October Term, 1913.

No. —.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA.

Sur Writ of Error by The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County, the Court to which the Supreme Court of Pennsylvania Remitted the Record and in which Court Final Judgment has been Entered upon the Mandate of the Supreme Court of Pennsylvania.

Assignments of Error.

1. The learned Supreme Court of the State of Pennsylvania erred in holding that the business done within the Commonwealth of Pennsylvania by The Equitable Life Assurance Society of the United States within the meaning of the Act of the Pennsylvania General Assembly of June 28, 1895 (P. L. 408), consisted in "furnishing

protection to the beneficiaries named in the policies against loss from the death of the insured, to the amount designated by the policy"; and also in holding that "furnishing this protection is the business to be done by the society within this commonwealth, as contemplated by the statute"; thereby giving to the said Act of 1895 an effect which abridges the privileges or immunities of citizens of the United States, guaranteed by the Constitution of the United States, and deprives insurance companies of other states of their property without due process of law.

93 2. The learned Supreme Court of the State of Pennsylvania erred in so interpreting the Act of the Pennsylvania General Assembly of June 28, 1895 (P. L. 408), as to make it effective upon premiums collected in other states than the Commonwealth of Pennsylvania, which premiums were never property of the Equitable Life Assurance Society of the United States within that Commonwealth, thereby violating a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

3. The learned Supreme Court of the State of Pennsylvania erred in not sustaining the following objection specified in the appeal of The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County from the account entered against it by the Auditor General and State Treasurer of Pennsylvania, viz:

"3. The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28, 1895, (P. L. 408), nor by any other Act of Assembly, or if it is, the said Act is unconstitutional and void because in violation of section 1 of Article XIV. of the Amendments to the Constitution of the United States which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

4. The learned Supreme Court of the State of Pennsylvania erred in not sustaining the following objection specified in the appeal of The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County from the account entered against it by the Auditor General and State Treasurer of Pennsylvania, viz:

"4. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere

94 outside of Pennsylvania and which were never within the State of Pennsylvania. Neither the Act of June 28, 1895, (P. L. 408), nor any other Act of Assembly, can be construed to impose a tax upon such premiums, or if the said Act, or any other

Act of Assembly, can be so construed, it is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

5. The learned court erred in reversing the judgment of the Court of Common Pleas of Dauphin County in favor of The Equitable Life Assurance Society of the United States, and against the Commonwealth of Pennsylvania.

6. The learned court erred in not affirming the judgment of the Court of Common Pleas of Dauphin County in favor of The Equitable Life Assurance Society of the United States and against the Commonwealth of Pennsylvania.

To the Honorable, the Judges of the Supreme Court of the United States:

The Petitioner prays for a reversal of the judgment entered against it upon the mandate of the Supreme Court of Pennsylvania for the reasons assigned above.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

By Its Attorneys,

THOS. DE WITT CUYLER,
A. C. STAMM.

(Endorsed:) 436 Com'th Docket, 1910. The Equitable Life Assurance Society of the United States, Plaintiff in Error, vs. Commonwealth of Pennsylvania. Assignments of Error. Filed September 24, 1913. Olmsted & Stamm, Attorneys for Plaintiff in Error.

95 *Return to Writ of Error from Supreme Court of the United States, and Certificate.*

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

And now, to-wit, September 24th, 1913, the said The Equitable Life Assurance Society of the United States, having produced to the Court of Common Pleas of Dauphin County, Pennsylvania, the Writ of the United States of America for the correcting of errors of and upon the said premises and commanding the record and proceedings aforesaid, of the judgment aforesaid so as aforesaid rendered with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington within thirty days from the date of the writ, to-wit, August 28, 1913, which Writ of Error is hereunto annexed, in pursuance whereof, and according to the form and effect of the Act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said Writ of Error, are hereby transmitted to the said Supreme Court of the United States accordingly.

In testimony that the foregoing, contained on pages 1 to 95 is a duly certified transcript of the complete record and proceedings in the within-entitled case wherein the Commonwealth of Pennsylvania was plaintiff below and The Equitable Life Assurance Society of the United States was defendant below, with all things concerning the same, I have hereunto subscribed my name and affixed the seal of the said Court of Common Pleas of Dauphin County, Pennsylvania, at Harrisburg, the day and year just above written.

[Seal Court of Common Pleas, Dauphin County, Pa.]

LOCKWOOD B. WORDEN,
Prothonotary of the Court of Common Pleas of Dauphin County, Pennsylvania.

96 COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

I, Lockwood B. Worden Prothonotary of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein Commonwealth of Pennsylvania — Plaintiff, and The Equitable Life Assurance Society of the United States Defendant, so full and entire as the same remains of record before the said Court, at No. 436 Commonwealth Docket, A. D. 1910.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 24th day of Sept. A. D. 1913.

[Seal Court of Common Pleas, Dauphin County, Pa.]

LOCKWOOD B. WORDEN, *Prothonotary.*

I, George Kunkel, President Judge of the 12th Judicial District, composed of the Courts of Dauphin County do certify that Lockwood B. Worden by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of Common Pleas of said County, was at the time of so doing and now is Prothonotary in and for said County of Dauphin in the Commonwealth of Pennsylvania, duly commissioned and qualified; to all of whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

[Seal Court of Common Pleas, Dauphin County, Pa.]

GEORGE KUNKEL,
President Judge.

COMMONWEALTH OF PENNSYLVANIA,
County of Dauphin, ss:

I, Lockwood B. Worden Prothonotary of the Court of Common Pleas in and for said County, do certify that the Honorable George

Kunkel by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Common Pleas, Orphans' Court and Court of Quarter Sessions of the Peace in and for said County, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 24th day of September A. D. 1913.

[Seal Court of Common Pleas, Dauphin County, Pa.]

LOCKWOOD B. WORDEN, *Prothonotary.*

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Common Pleas of Dauphin County, State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Common Pleas, before you, or some of you, in the said suit between Commonwealth of Pennsylvania and The Equitable Life Assurance Society of the United States wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
98 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Equitable Life Assurance Society of the United States as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the twenty-eighth day of August, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United State.

99 [Endorsed:] 436 Com'th Dk. 1910. Filed in Court of Common Pleas of Dauphin County, State of Pennsylvania, September 2, 1913. Lockwood B. Worden, Prothonotary. A. C. Stamm, Att'y for Pl'f in Error.

100 UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Common Pleas of Dauphin County, State of Pennsylvania, wherein The Equitable Life Assurance Society of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this twenty-eighth day of August, in the year of our Lord one thousand nine hundred and thirteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

Service of the above citation accepted, September 2" 1913.

J. E. B. CUNNINGHAM,
First Deputy Attorney General of the Commonwealth of Pennsylvania.

101 [Endorsed:] 436 Com'th Dk. 1910. Filed in Court of Common Pleas of Dauphin County, State of Pennsylvania, September 2, 1913. Lockwood B. Worden, Prothonotary. A. C. Stamm, Att'y for Pl'f in Error.

102 In the Supreme Court of the United States, October Term, 1913.

No. —.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA.

Sur Writ of Error by The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County, the Court to which the Supreme Court of Pennsylvania Remitted the Record and in which Court Final Judgment has been Entered upon the Mandate of the Supreme Court of Pennsylvania.

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1. The learned Supreme Court of the State of Pennsylvania erred in holding that the business done within the Commonwealth of Pennsylvania by The Equitable Life Assurance Society of the United States within the meaning of the Act of the Pennsylvania General Assembly of June 28, 1895 (P. L. 408), consisted in "furnishing protection to the beneficiaries named in the policies against loss from the death of the insured, to the amount designated by the policy"; and also in holding that "furnishing this protection is the business to be done by the society within this commonwealth, as contemplated by the statute"; thereby giving to the said Act of 1895 an effect which abridges the privileges or immunities of citizens of the United States, guaranteed by the Constitution of the United States, and deprives insurance companies of other states of their property without due process of law.

103 2. The learned Supreme Court of the State of Pennsylvania erred in so interpreting the Act of the Pennsylvania General Assembly of June 28, 1895, (P. L. 408), as to make it effective upon premiums collected in other states than the Commonwealth of Pennsylvania, which premiums were never property of The Equitable Life Assurance Society of the United States within that Commonwealth, thereby violating a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

3. The learned Supreme Court of the State of Pennsylvania erred in not sustaining the following objection specified in the appeal of The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County from the account entered against it by the Auditor General and State Treasurer of Pennsylvania, viz:

"3. The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received

by appellant at its office in New York, or elsewhere outside of Pennsylvania and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28, 1895, (P. L. 408), nor by any other Act of Assembly, or if it is, the said Act is unconstitutional and void because in violation of section 1 of Article XIV. of the Amendments to the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The learned Supreme Court of the State of Pennsylvania erred in not sustaining the following objection specified in the appeal of The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County from the account entered against it by the Auditor General and State Treasurer of Pennsylvania, viz:

"4. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere
104 outside of Pennsylvania and which were never within the State of Pennsylvania. Neither the Act of June 28, 1895, (P. L. 408), nor any other Act of Assembly, can be construed to impose a tax upon such premiums, or if the said Act, or any other Act of Assembly, can be so construed, it is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

5. The learned court erred in reversing the judgment of the Court of Common Pleas of Dauphin County in favor of The Equitable Life Assurance Society of the United States, and against the Commonwealth of Pennsylvania.

6. The learned court erred in not affirming the judgment of the Court of Common Pleas of Dauphin County in favor of The Equitable Life Assurance Society of the United States and against the Commonwealth of Pennsylvania.

To the Honorable, the Judges of the Supreme Court of the United States:

The Petitioner prays for a reversal of the judgment entered against it upon the mandate of the Supreme Court of Pennsylvania for the reasons assigned above.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

By Its Attorneys,

THOS. DE WITT CUYLER,
A. C. STAMM.

105 [Endorsed:] The Equitable Life Assurance Society of the United States, Plaintiff in Error, vs. Commonwealth of Pennsylvania. Assignments of Error. Thos. De Witt Cuyler. A. C. Stamm, Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 23,864. Pennsylvania, Dauphin County, Court of Common Pleas. Term No. 263. The Equitable Life Assurance Society of the United States, plaintiff in error, vs. Commonwealth of Pennsylvania. Filed September 25th, 1913. File No. 23,864.

MAY 3 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1914. No. 265.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

Reply of Plaintiff in Error to Certain Allegations as to Facts, Made in Brief of Defendant in Error.

CHARLES W. PUSSON,
THOMAS DEWITT CUYLER,
WM. S. SNYDER,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

October Term, 1914. No. 263.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

Reply of Plaintiff in Error to Certain Allegations as to Facts, Made in Brief of Defendant in Error

Since in the Brief for the Defendant in Error in this case there occur a number of statements of facts which are not borne out by the Record and which are misleading, counsel for the Plaintiff in Error have deemed it advisable to submit to the Court in printed form comments with reference to these statements, in order that no error may arise in determining the law applicable to the real facts in the case.

In the statement of the questions involved, found on pages 1 and 2 of the Brief for Defendant in Error, reference is made to the paying of renewal premiums by remittances made "through the mails." Doubtless some of the payments of renewal premiums involved in this case were made in that manner, but it will be seen, from an examination of the affidavit of Mr. W. A. Day, found in the Record, at page 20, that such payments were often made by the insured in person. The following statement is made in the affidavit, at page 25 of the Record:

"In view of the fact that so many people in Pennsylvania do business in the City of New York, it is hardly to be wondered at that a good many who are insured in the defendant Society prefer to pay their renewal premiums in New York City, or at other cashier agencies at other than Pennsylvania points which may, for business or other reasons, be more convenient for them than the Pennsylvania cashier agencies. In such cases, renewal premiums are paid by the insured *in person* at the home office or the cashier agency at which he elects to make his payment, or checks are sent by him by mail, to such home office or cashier agency."

In the counter-statement of the case, counsel for Defendant in Error have stated (see page 3 of the Brief) that the policies upon which the renewal premiums in question were paid are entitled to annual dividends, and further on (Brief, page 32), it is asserted that—

"A dividend is paid EVERY *year to the assured in Pennsylvania* on these policies,"

and again, (page 34), that,

"A dividend is paid the insured in the State."

These statements are too broad. It is true that the specific form of insurance policy which was introduced

as an exhibit in the case and is printed in the Record at page 34, calls for annual dividends. It was the case, however, that The Equitable Life Assurance Society of the United States issued at the time when the taxes in question originated, policies calling for deferred dividends, that is, dividends which were not paid until the end of a period of time, such as twenty years; so that in many instances there were no annual premiums paid to the policyholders. So, while some policy-holders received dividends during the years in question, many undoubtedly did not. There is no evidence either way.

It is also intimated (page 33 of the Brief) that the policy dividends are as a rule *paid in cash.* Cash payment is one of four options given in the usual policy forms as to the manner in which policy dividends may be used by the insured. These are set forth in Exhibit G (Record, page 34), as follows:

"Dividends, at the option of the Insured, (or of the assignee if any) shall in each year, on the anniversary of the register date hereof, be either

1. Paid in Cash; or, 2. Applied toward the payment of any premium or premiums; or, 3. Applied to the purchase of paid-up Additional Insurance; or, 4. Left to accumulate at 3 per cent., compounded annually, and payable at the maturity of this policy, but withdrawable at any anniversary of its register date."

The three options of the insurance policies, not calling for cash payments of dividends, are not set forth in the Brief for Defendant in Error. The second one of these gives the policy-holder the right to have a dividend "applied toward the payment of any premium or premiums." Experience shows, though this fact is not in evidence, that policy-holders most frequently avail

themselves of this second option; so that it is only *occasionally* that cash payments of dividends are received by policy-holders, except, of course, under deferred dividend policies. The other two options are sometimes taken advantage of, and it is manifest from their character that they involve the doing of business at the Society's home office, and not where the insured persons live. But, as observed above, evidence is wanting on these matters, so that comment on them is only speculative.

The speciment form of policy (Exhibit G, Record, Page 34) was not introduced as evidence upon these points,—which are, perhaps, entirely immaterial at any rate,—but was introduced only for the purpose of showing the provisions in the policies of the Plaintiff relating to the payment of premiums and the issuance of recepits therefor.

This brings us to another unqualified assertion, several times reiterated (See pages 33, 34 and 35 of the Brief), that upon payment of renewal premiums, receipts were delivered *in Pennsylvania* to the policyholders. Of course it is clear that when payments were made in person by policyholders, or by their agents, at the home office or agencies outside of Pennsylvania, then the receipts were not delivered in that State. So it is only with reference to a portion of the policies involved that it can be argued there was business done in Pennsylvania by virtue of the delivery of receipts for renewal premiums.

Again the Defendant in Error states (Brief, page 14) that the Plaintiff in Error "concedes the right of the Legislature to define 'doing business.'" This is not a correct statement, for the Plaintiff in Error does not concede the right of the Legislature, or of the Judici-

ary, to establish such a definition of "doing business" as shall deprive this Society, or any corporation or invidual, of rights guaranteed by the Federal Constitution.

The assertion is made (Brief page 22) that the attention of the State Supreme Court was not called, in the petition for a reargument, to the point that it had assumed a fact which was not in the record. The following language will be found in the petition for a reargument, (Record, page 60):

"The decision appears based upon the proposition that, no matter where the insurance was effected, or the premiums paid, the business done is that of affording indemnity and protection to residents of Pennsylvania," * * *

"There is no evidence whatever as to the residence of all or any of the beneficiaries named in the policies from which the premiums in suit were derived; and, as the policies of Classes 1 and 4 were all taken out originally by persons who were non-residents at the time, there can be no presumption, legal or otherwise, that the beneficiaries are resident of Pennsylvania."

Upon this point it may be further noted that counsel for the Defendant in Error have contradicted themselves in their argument, for, having in one place made the assertion referred to above, they say later (Brief, page 28), referring to the erroneous assumption of a fact not in the record evidence and whether it was brought to the Supreme Court's notice, that: "In this case the attention of the Court was called by a motion for a reargument," and, just after this: "* * * the Supreme Court, having had its attention called to the matter * * *."

Another point, which is advanced in the argument as to the doing of business with reference to the policies the premiums on which are here involved, is that the proofs of loss in case of death of the insured will be executed in Pennsylvania, (Brief, pages 3, 33 and 34). This is hardly a matter to be introduced into the present case, since there is no evidence that proofs of claim were made under the policies upon which the renewal premiums in question were paid. Moreover it is a mere assumption of possibilities to state that proofs of claim under the policies were made or will be made in Pennsylvania. As a rule, these are executed where the insured persons die. What evidence is there that any of the insured persons holding policies here involved died in Pennsylvania? What assurance is there that they will die in Pennsylvania, or even that their legal residences will be in that State at the times of their deaths? However, discussion of this point seems unnecessary, because the making of proofs of loss is not business done by the insurance company, but by the beneficiaries or others interested in the insurance.

There are a few other statements in the Brief of Counsel for Defendant in Error which are not fully supported by the Record, but which may possibly be warranted as merely argumentative. These are left to be met by the Brief of Plaintiff in Error and the oral argument.

CHARLES W. PIERSON,
THOMAS DEWITT CUYLER,
WM. S. SNYDER,
Attorneys for Plaintiff in Error.

Supreme Court U. S.
FILED
MAR 20 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1914. No. 263.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In Error to the Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR.

CHARLES W. PUDDON,
THOMAS DEWITT CUYLER,
WM. S. SCHAUS,
Attorneys for Plaintiff in Error.

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Act of June 1, 1911 (P. L. 607), ... 15, 29

Supreme Court of the United States

October Term, 1914. No. 263.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In Error to the Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

The question for determination in this case is whether the Commonwealth of Pennsylvania is entitled to recover from The Equitable Life Assurance Society of the United States certain taxes which are claimed to be due on premiums paid during the years 1906, 1907, 1908, 1909 and 1910 in renewal of certain life insurance policies issued by the said Society.

The Equitable Life Assurance Society of the United

States is a corporation chartered by the State of New York, and having its principal office and place of business in the City of New York in said state. It is, as its name indicates, a life insurance company, and it is extensively engaged in that business. It does business in all the nations of the world, with very few exceptions. In the United States it does business in all the States of the Union except Wisconsin and Texas, but a larger proportion of its business is transacted in New York than in other States, that being the State of its creation and where its principal or home office is located. In each State where it transacts business it is licensed under the laws thereof. In each State where it transacted business in 1906, 1907, 1908, 1909 and 1910, with the exception of Nevada, the laws thereof required it to pay a tax upon premiums. In each State where it transacts business it pays the tax required by the laws thereof to be paid upon its premiums, and did pay such tax for each of the years 1906, 1907, 1908, 1909 and 1910.

In the beginning of the year 1907 the Society reported to the Insurance Commissioner of Pennsylvania its entire premium receipts for the year 1906 from policies in force on the lives of residents of Pennsylvania. It also reported premiums to the amount of $4,393,-107.14, received from business done in Pennsylvania during the said year, paid thereon a tax of two per centum, amounting to $87,862.14, and thereupon received from the Insurance Commissioner of Pennsylvania a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the year ending March 31, 1908. (Record, page 30).

For the years 1907, 1908, 1909 and 1910, the Society made similar reports. For the year 1907 it paid $86,-656.24 of tax upon $4,332,811.81 received from business done in Pennsylvania; for the year 1908, $88,874.68 of tax upon $4,443,734.15 of business done in Pennsyl-

vania; for the year 1909, $93,190.76 of tax upon $4,659,538.06 of business done in Pennsylvania; and for the year 1910, $97,743.39 of tax upon $4,887,169.61 of business done in Pennsylvania. Upon the payment of the taxes aforesaid for the respective years the Insurance Commissioner of Pennsylvania annually sent the Society a certificate setting forth that it had complied with the laws of that State and authorizing it to transact business in Pennsylvania for the ensuing year ending March 31. (Record, pages 31, 32 and 33.)

The difference between the total amount of premiums reported as received from residents of Pennsylvania and the amount of premiums reported as received from business done in Pennsylvania, was made up of premiums paid to the Society at points outside of Pennsylvania by persons who resided in Pennsylvania during the year for which the premiums were paid. The Insurance Commissioner of Pennsylvania knew at the time the licenses were issued that the amounts of premiums reported for the respective years did not include all the premiums received from residents of Pennsylvania. The additional premiums were almost exclusively renewal premiums received outside of Pennsylvania in renewal of policies held by residents of Pennsylvania. The Society did not consider such additional premiums, received outside of Pennsylvania, as taxable in Pennsylvania, and no tax was paid thereon. The premiums thus reported to the Insurance Commissioner were as follows:

Year.	Premiums Collected in State.	Premiums Collected Outside State.	Total.
1906	$4,393,107.14	$1,016,471.08	$5,409,578.22
1907	4,332,811.81	1,050,770.17	5,383,581.98
1908	4,443,734.15	1,019,281.76	5,463,015.91
1909	4,659,538.06	964,997.08	5,624,535.14
1910	4,887,169.61	876,786.45	5,763,956.06

In the published reports of the Insurance Commissioner for the years 1906, 1907 and 1908, under the head of "Business in Pennsylvania," the Commissioner included only the premiums collected in the State as above set forth, thus apparently accepting the Society's construction of the law with the full knowledge of the facts; but in his published report for 1909, (published in 1910), under the head of "Business in Pennsylvania," he inserted the total above given for that year, thus including the premiums collected outside of Pennsylvania. (Record, page 22.)

Under date of February 21, 1910, the Society sent to the Insurance Commissioner of Pennsylvania a check for $93,190.76, in payment of the two per cent. tax on $4,659,538.06 of gross premiums for the year 1909. Under date of February 25, 1910, the Insurance Commissioner acknowledged receipt of the check, and added:

"I find, however, on examination of the annual statement, that there was $964,997.08 of premiums received on insurance written and in force on the lives of citizens of the State, but collected outside the State, which you have not reported for taxation."

This was the first intimation the Society had that the Insurance Commissioner intended to adopt a different construction of the statute imposing the tax than the construction theretofore given to it by both the Society and the Insurance Commissioner.

The policies with respect to which premiums were paid outside of the State of Pennsylvania were of the following four classes, viz:

1. Policies taken out outside of Pennsylvania by persons who were non-residents at the time the policies were taken out.
2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.
3. Policies taken out in Pennsylvania by persons

who were residents of Pennsylvania when the policies were taken out.

4. Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

In September, 1910, settlements of account for taxes on the additional premiums were settled against the Society by the taxing officials of the State of Pennsylvania in the following amounts, viz:

For the year 1906,	$20,329.42
For the year 1907,	21,015.40
For the year 1908,	20,385.64
For the year 1909,	19,299.94
For the year 1910,	17,535.73

Appeals were taken from the settlements of the five accounts to the Court of Common Pleas of Dauphin County, Pennsylvania, and in that Court the cases were consolidated and tried as one case. In pursuance of an Act of the Pennsylvania Legislature, approved April 22, 1874, (P. L. 109), the Commonwealth and the Society agreed to dispense with the jury and submit the case to the decision of the Court. The Dauphin County Court decided the Society was not liable for any tax upon premiums paid outside of Pennsylvania by residents of Pennsylvania, basing its decision on the ground that the payment of renewal premiums did not constitute doing business within the state within the year for which the premiums were paid. The Commonwealth of Pennsylvania appealed the case to the Supreme Court of the State of Pennsylvania, and this Court reversed the Court of Common Pleas of Dauphin County, holding that the Society is liable for tax upon such premiums, basing its decision on the ground that the business done within the state by the Society during the year for which the premiums were paid was furnishing protection to the beneficiaries named in the policies.

ASSIGNMENTS OF ERROR.

1. The learned Supreme Court of the State of Pennsylvania erred in holding that the business done within the Commonwealth of Pennsylvania by The Equitable Life Assurance Society of the United States within the meaning of the Act of the Pennsylvania General Assembly of June 28, 1895, (P. L. 408), consisted in "furnishing protection to the beneficiaries named in the policies against loss from the death of the insured, to the amount designated by the policy"; and also in holding that "furnishing this protection is the business to be done by the society within this commonwealth, as contemplated by the statute"; thereby giving to the said Act of 1895 an effect which abridges the privileges or immunities of citizens of the United States, guaranteed by the Constitution of the United States, and deprives insurance companies of other states of their property without due process of law.

2. The learned Supreme Court of the State of Pennsylvania erred in so interpreting the Act of the Pennsylvania General Assembly of June 28, 1895, (P. L. 408), as to make it effective upon premiums collected in other states than the Commonwealth of Pennsylvania, which premiums were never property of The Equitable Life Assurance Society of the United States within that Commonwealth, thereby violating a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

3. The learned Supreme Court of the State of Pennsylvania erred in not sustaining the following objection specified in the appeal of The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County from the account entered

against it by the Auditor General and State Treasurer of Pennsylvania, viz:

"3. The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania and which never were within the State of Pennsylvania. The taxation of such gross premiums is not authorized by the Act of June 28, 1895, (P. L. 408), nor by any other Act of Assembly, or if it is, the said Act is unconstitutional and void because in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

4. The learned Supreme Court of the State of Pennsylvania erred in not sustaining the following objection specified in the appeal of The Equitable Life Assurance Society of the United States to the Court of Common Pleas of Dauphin County from the account entered against it by the Auditor General and State Treasurer of Pennsylvania, viz:

"4. The account hereby appealed from is erroneous, illegal and void because therein tax is charged upon premiums paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania and which were never within the State of Pennsylvania. Neither the Act of June 28, 1895, (P. L. 408) nor any other Act of Assembly, can be construed to impose a tax upon such premiums, or if the said Act, or any other Act of Assembly, can be so construed, it is in violation of a necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits."

5. The learned court erred in reversing the judgment of the Court of Common Pleas of Dauphin County in favor of The Equitable Life Assurance Society of the United States, and against the Commonwealth of Pennsylvania.

6. The learned court erred in not affirming the judgment of the Court of Common Pleas of Dauphin County in favor of The Equitable Life Assurance Society of the United States and against the Commonwealth of Pennsylvania.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

The immediate Act under which the Commonwealth of Pennsylvania seeks to collect the tax in question is an Act of the Pennsylvania Legislature of June 28, 1895, (P. L. 408), which, in Section 1, provides as follows, viz:

"That hereafter the annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding."

The Supreme Court of Pennsylvania, by a divided Court, held that the Society was doing business in Pennsylvania as to all of the four classes of policies. Mr. Justice Potter, who delivered the opinion of the majority, said that the business done with respect to the said four classes of policies was furnishing protection to the *beneficiaries* named in the policies. He used the following language, viz:

"In order to determine the question in controversy we must ascertain the source of the premiums which were paid to agencies outside the State. If they were received by the Society from business done within the Commonwealth, then they were subject to the tax. If they did not come from such business they were not subject to the tax. What then is the meaning of the words 'business done within this Commonwealth' as used in the statute taxing gross premiums of every character and description, received from such business? Manifestly the business in which the Society is engaged is that of insuring lives; that is, *in furnishing protection to the beneficiaries named in the policies* against loss from the death of the insured, to the amount designated in the policy. *Furnishing this protection is the business* to be done by the Society within this Commonwealth, as contemplated by the statute, which fixes the amount of the tax which it, as an insurance company organized under the laws of another state, is to pay for the privilege of entry and doing this business within this Commonwealth, and with our people, its residents. The Court below seems to have unduly narrowed its inquiry, and contented itself with asking whether the mere receipt of premiums at an outside office, was doing business within this Commonwealth. Certainly not, if that was all there was to it. But the answer to that question is not at all decisive of the real inquiry here. The defendant Society does not exist merely for the collection of premiums; that is a mere incident to the great and beneficial purpose for which it exists. When it comes within our borders to do business, it renders a service; *it furnishes protection and indemnity to its beneficiaries, residents of the State of Pennsylvania. That is the business which it does in Pennsylvania,* and that is the purpose for which it seeks and is granted permission to enter." (Record, page 55).

The Supreme Court of Pennsylvania, therefore, holds that the premiums are taxable because the Society was doing business in the State of Pennsylvania

in the matter of said premiums, during the years in question, and that the business done consisted in "*furnishing protection to the beneficiaries* named in the policies against loss from the death of the insured." The Court further says: "*Furnishing this protection is the business to be done by the Society within this Commonwealth,* as contemplated by the statute." Again, it says: "When it comes within our borders to do business, it renders a service; *it furnishes protection and indemnity to its beneficiaries, residents of the State of Pennsylvania. That is the business which it does in Pennsylvania.*" This is a most remarkable statement, when it is considered that there is not a single word of testimony in the whole case which goes to show where *any beneficiary* under any of the policies in question lived. This matter was not considered in any shape or form in the trial court, and the Record does not contain a single word tending to show whether the beneficiaries lived within the State of Pennsylvania or without the State of Pennsylvania.

The only business which the Court could find the Society was doing in Pennsylvania in the matter of the policies in question, in the respective years for which the tax is charged, was furnishing protection to the beneficiaries named in the policies. But, how could the business have been done in Pennsylvania unless the beneficiaries lived in Pennsylvania? Clearly it could not have been so done. This the court recognized, and met the difficulty by boldly assuming and flatly asserting that the *beneficiaries* were "residents of the State of Pennsylvania." If the beneficiaries did not live in Pennsylvania, then what business did the Society do in Pennsylvania in the matter of these policies? Conclusively the Supreme Court of Pennsylvania believed none, because in answer to its own question as to whether the mere receipt of premiums at points outside of Pennsylvania from residents of Pennsylvania

constitutes doing business in Pennsylvania, it says, "Certainly not, if that was all there was to it."

It thus appears that the decision of the Supreme Court of Pennsylvania rests wholly upon its unwarranted assumption that the beneficiaries lived in Pennsylvania, there not being a scintilla of testimony to support the assumption. All of the testimony in the case is found in an affidavit of William A. Day, President of the Equitable Life Assurance Society of the United States, printed on page 20 of the Record. There was an agreement entered into in the trial court, between counsel for the Society and counsel for the Commonwealth of Pennsylvania, as to certain facts, but this agreement is incorporated in the affidavit of Mr. Day, and, therefore, the complete facts are contained in his affidavit. Under the Act of the Pennsylvania Legislature of April 22, 1874, (P. L. 109), in pursuance of whose provisions the trial by jury was waived, the Court finds the facts with like effect as though a jury had found them. The trial court found the facts to be as set forth in the deposition of William A. Day, President of the Society. (Record, page 49).

THE ASSUMPTION BY A STATE COURT OF A FACT NOT IN EVIDENCE AS A BASIS FOR A DECISION IS A DENIAL OF DUE PROCESS OF LAW.

The assumption by the Supreme Court of Pennsylvania of the existence of facts which were not in the case, and concerning which there was no testimony or agreement, is a denial of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In *Chicago, Burlington & Quincy Railroad Company* vs. *Chicago, 166 U. S. 226,* there was presented to this Court the question whether it would review a final

judgment of the Supreme Court of Illinois and certain rulings of that court which were alleged to be in disregard of the Fourteenth Amendment. It appears that in proceedings relative to the opening of a street in Chicago, the jury fixed one dollar as just compensation to the Railroad Company, although other property owners in the vicinity received greater compensation. The Railroad Company alleged that the verdict of the jury and the judgment based upon it were contrary to the Fourteenth Amendment to the Constitution of the United States. It appears that no mention of any Federal question was made in the decisions of the State courts. Commenting on this point, Mr. Justice Harlan said, on page 231:

"It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this court to reexamine the final judgment of the state court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right."

On page 233 he said:

"The city contends that the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and as that question was determined in the mode prescribed by the constitution and laws of Illinois, the company appearing and having full opportunity to be heard, the requirement of due process of law was observed. If this position be sound, it is an end of the case, and we need not determine whether the state court erred in not recognizing the principles of law embodied in the instructions asked by the railroad company.

"It is, therefore, necessary to inquire at the outset whether 'due process of law' requires compensation to

be made or secured to the owner of private property taken for public use, and also as to the circumstances under which the final judgment of the highest court of a State in a proceeding instituted to condemn such property for public use may be reviewed by this court."

Again, on the same page he said:

"It must be observed that prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' "

On page 234 he said:

"A State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. *Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment.*"

Further comment was made on this point at page 241 of the opinion, as follows:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

In *Fayerweather* vs. *Ritch, 195 U. S. 276,* this Court was considering a case which originated in the State courts of New York. The plaintiff in error contended that the question at issue hinged upon the validity of certain releases, but that notwithstanding this fact the Court reached its conclusion without any determination as to the validity of the releases. The alleged failure to consider the validity of the releases was held by this Court to be a sufficient ground for reviewing the case. On page 298 Mr. Justice Brewer said:

"It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the State was the validity of those releases; that notwithstanding this that court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question, and rendered their judgments upon that assumption, so that *the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate, without any finding of the vital fact which alone could destroy their right.* The contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. *Such decision of the state courts, made without any finding of the fundamental fact,* was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property *without any judicial determination of the fact upon which alone such deprivation could be justified*—a case is presented coming directly within the decision in 166 U. S. *supra.*"

The fundamental fact upon which the Supreme Court of Pennsylvania based its opinion was that *the beneficiaries were residents of Pennsylvania.* But no such fact was before the Court, and there was, therefore, no "judicial determination of the fact upon which alone" the taxation could be justified.

A petition was presented to the Supreme Court of the State of Pennsylvania, (Record, page 59), asking for a re-argument of the case, on the ground that the opinion was based upon the theory that the beneficiaries receiving the protection under the policies in question were residents of Pennsylvania, while there was no testimony going to show where a single beneficiary lived. The Court refused a re-hearing of the case, in the following words:

"And now, March 29, 1913, upon consideration of the within petition, the prayer thereof is refused."

Mr. Justice Fell, then Chief Justice of the Supreme Court of Pennsylvania, and Mr. Justice Brown, the present Chief Justice of the Court, dissented from the majority opinion, and based their refusal to concur on the ground that the Legislature did not intend the Act of 1895 to include within its taxable provisions premiums paid without the State of Pennsylvania, because in 1911 it passed the Act of June 1, (P. L. 607), changing the law. (Record, page 57.) Section 16 of the new Act provides that the tax shall be imposed upon all the premiums "whether the same were collected in this Commonwealth or elsewhere." The said Act of 1911 provides as follows:

"Every insurance company or association of another State or foreign government, authorized to do business in this Commonwealth, shall make report to

the Insurance Commissioner, on or before March first of each year, under oath of its president or secretary, showing the entire amount of premiums of every character and description received from business transacted in the Commonwealth during the year, or fraction of year, ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitutes for money, *or whether the same were collected in this Commonwealth or elsewhere,* and pay into the State Treasury the requisite tax upon all such premiums."

If the Legislature intended that the Act of 1895 should impose the tax upon premiums paid without the State of Pennsylvania, then why was it necessary to change the law and specifically provide that all premiums upon the lives of residents of Pennsylvania should be taxable "whether the same were collected in this Commonwealth or elsewhere." Prior to the Act of June 1, 1911, there was no Act providing for the collection of a tax upon premiums paid outside of the State, and the imposition of the tax upon this company under the circumstances is a deprivation of its property without due process of law.

THE TAX SOUGHT TO BE COLLECTED IS A PROPERTY TAX.

The Act of the Pennsylvania Legislature of June 28, 1895, (P. L. 408), is the immediate Act under which the tax in question is sought to be collected. In Section 1 it provides as follows, viz:

"That hereafter the annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description re-

ceived from business done within this Commonwealth within the entire calendar year preceding."

This Act of 1895 provides for a reduction of the rate from three per cent. to two per cent., but the tax is in fact imposed by the Act of the Pennsylvania Legislature of April 11, 1868, (P. L. 83), which amended and consolidated the laws of the State regulating the licensing of foreign insurance companies, as superseded by the Act of April 4, 1873, (P. L. 20). The said Act of 1868 provides in Section 6 for a license fee, or tax, from every insurance company in the following words, viz:

"Before any fire, marine or life insurance, trust or annuity company or association, or any health or casualty insurance company shall receive from the Auditor General such license as aforesaid, they shall pay to the Treasurer of the State, for the use of the Commonwealth, the sum of five hundred dollars for the privilege of transacting business in this State for the full term of one year, and in the same proportion for any less period * * *."

After providing in Section 6 for a specific license fee, Section 7 provides—

"That the agent of every insurance company or association, licensed under the provisions of this act, shall retain in his hands, out of the money received by him for premiums, gross sums paid for annuities and commissions for executing trusts, a sum equal to a tax of three per centum upon the entire amount of said premiums or commissions received by him as agent aforesaid, whether said premiums are received in money or in the form of notes, credits, loans or any other substitute for money; which said sum shall be paid to the treasurer of the commonwealth at the time of the expiration of the license of said agent; and the auditor general shall not have the power to grant a renewal of the license of such company or association un-

til the tax aforesaid is paid into the hands of the state treasurer for the use of the commonwealth; and the auditor general shall require from the agent of any such company or association a statement, under the oath or affirmation of such agent, setting forth the entire amount received for premiums within this commonwealth, for every year, or part of a year, ending on the thirty-first day of December, during the continuance of such license, and said statement must in all cases be accompanied by the certificate of the president of the company, for which said agent is authorized to act, stating that the whole amount of business done by said company in this commonwealth is faithfully and truly reported."

It thus appears that, under the Act of 1868, insurance companies were liable for a license tax of five hundred dollars, and, in addition thereto, were liable for a tax upon moneys received for premiums, that is, a property tax.

By the Act of April 4, 1873 (P. L. 20), the Legislature of Pennsylvania established an Insurance Department, and in said Act it transferred the licensing of insurance companies to the Insurance Commissioner. The specific license fee of five hundred dollars for permission to do business is omitted from the Act of 1873, but certain fees and charges are required to be paid in lieu of the cash payment of five hundred dollars. These payments are required by Sections 6 and 7, which read as follows:

"Section 6. The commissioner may employ an actuary to make the valuation of life policies, at the compensation of not exceeding three cents for each thousand dollars of insurance, to be paid by the company for which the valuation is made; and there shall be paid by every company to which this act applies, the following fees towards defraying the expenses of enforcing its provisions: For filing certified copy of charter, twenty-five dollars; for filing the annual statement

or certificate in lieu thereof, twenty dollars; for each certificate of authority and certified copy thereof, two dollars; for every copy of any paper filed in the department, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar; for official examinations of companies under this act, the actual expenses incurred."

"Section 7. The insurance commissioner shall, on or before the tenth day of each month, make report to the auditor general, showing the entire amount of fees received by him during the month preceding, and pay over the same to the state treasurer; and in case the necessary expenses of said department exceed the amount of fees collected under this act, *exclusive of the tax upon premiums,* the excess of such expense shall be annually assessed by the commissioner, in just proportion, upon all the insurance companies doing business in this state, and the commissioner is empowered to collect such assessments and pay the same into the state treasury; and all the necessary expenses of the commissioner in the execution of this act shall be paid by the state treasurer upon his certificate and the warrant of auditor general, out of the fund thus created."

In Section 10 of the Act it is required that, in addition to the license fees and charges provided for in Sections 6 and 7—

"It shall be the duty of every such company or association, authorized to transact business in this state, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this state, during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits or any other substitute for money, and pay into the

state treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury."

Here again, insurance companies are required to pay, in addition to the specific license fees, a tax upon moneys received from premiums, that is to say, a property tax. The tax claimed by the Commonwealth of Pennsylvania in this suit for the years 1906, 1907, 1908, 1909 and 1910, is sought to be collected under the said Act of 1873, as modified by the Act of June 28, 1895 (P. L. 408). It, therefore, appears, both from the Act of 1868 and the Act of 1873, that the tax now claimed by the Commonwealth of Pennsylvania is not a license fee, or license tax, because, in each of said acts, insurance companies are required to pay specific sums as license taxes or license fees for the privilege of doing business in the Commonwealth of Pennsylvania, and the tax upon the moneys received from premiums is a tax upon property over and above the license tax. In Section 7 of the Act of 1873, quoted above, it is provided—

"In case the necessary expenses of said department exceed the amount of fees collected under this Act, *exclusive of the tax upon premiums,* the excess of such expense shall be annually assessed by the Commissioner in just proportion upon all the insurance companies doing business in this State, and the Commissioner is empowered to collect such assessments and pay the same into the state treasury."

This provision in Section 7 draws a clear line of distinction between fees collected for license purposes and the tax upon premiums.

As throwing further light upon the nature of the tax sought to be collected, it should be mentioned that the

Act of 1895, which reduces the rate from three per cent. to two per cent., is a supplement to the general revenue Act of the Legislature of Pennsylvania of June 1, 1889 (P. L. 420), which last Act is a supplement to the general revenue Act of June 7, 1879 (P. L. 112), and is entitled "An Act to provide revenue by taxation." The tax now in dispute is a tax intended to increase the general revenues of the Commonwealth of Pennsylvania; its imposition is provided for in a general revenue act, and the tax when paid into the State Treasury goes into the general funds and is used for general purposes. In Section 2 of the said Act of 1895, it is provided that one-half of the tax upon premiums, when collected, shall be paid to the Treasurers of the several cities and boroughs within the Commonwealth of Pennsylvania. The City of Scranton some years ago passed an ordinance appropriating all the revenue received from this fund to the Scranton Firemen's Relief Association. The Treasurer of Scranton, in 1900, 1901 and 1902, believing that such an appropriation of the moneys could not be made, refused to pay the money over to the Relief Association. A suit resulted to determine whether the tax could be so distributed and the decision of the case in the Supreme Court of Pennsylvania is found in *Firemen's Relief Association* vs. *Scranton, 217 Pa. St., 585.* That court held that the tax may be used for any lawful purpose whatever. On page 589, Mr. Justice Potter said, concerning such tax:

"It is to be paid into the treasuries of the several municipalities without distinction as to its use from any other fund therein. It may be used in the discretion of the local authorities for any lawful purpose."

A license fee is intended to furnish sufficient funds to pay for the supervision of the business licensed. It is not intended to furnish revenue, and the imposition of license fees in such amounts as to clearly indicate they

are intended for revenue instead of for license fees, has been prohibited. This court has held, in the cases of *Atlantic & Pacific Telegraph Co.* vs. *Philadelphia, 190 U. S., 160,* and *Postal Telegraph-Cable Co.* vs. *Taylor, 192 U. S., 64,* in the matter of license fees upon telegraph companies for the maintenance of poles and wires, that a license fee can not be imposed for purposes of inspection on telegraph companies doing an interstate business, which is so much in excess of the expenses of inspection that it is plain that it was imposed not to repay such expenses, but as a means of raising revenue. On page 69 of the *Postal Telegraph Cable Company* case, Mr. Justice Peckham said:

"We assume that a tax of this kind ought to be large enough to cover all expenses of police supervision of the property and instrumentalities used by the company in the borough, and that it is not bound to furnish such supervision for nothing, but may, in addition to ordinary property taxation, subject the corporation to a charge for the expenses of the supervision."

The facts, of course, were different from the facts in the case now before the Court. but the principle is plainly stated that a license fee should be only sufficient in amount to cover necessary expenses and supervision. For each of the years 1906, 1907, 1908, 1909 and 1910 The Equitable Life Assurance Society has paid to the Commonwealth of Pennsylvania, in addition to license fees, a tax falling but a little below $100,000. (Record, pages 20 and 21.) It is now sought to collect a further tax aggregating, for the five years, approximately $100,000 additional. These amounts show conclusively that the tax now sought to be collected is not a license tax, intended to pay for any supervision, even though special license charges and fees

had not been paid by the Society. It seems to be fairly deducible from these facts that the tax in dispute is, therefore, not a license tax, but a property tax.

In the case of *Insurance Company of North America* vs. *The Commonwealth of Pennsylvania, 87 Pa. St., 173*, the Supreme Court of Pennsylvania was considering the nature of a tax upon the premiums of a domestic insurance company. On page 181, in discussing whether or not the taxation of premiums received by the company, drawn from sources outside of the State of Pennsylvania, would be an interference with any provision in the Federal Constitution, Mr. Chief Justice Agnew said, concerning the tax:

"That it is not a tax in the sense of 'imposts or duties laid upon imports or exports' is plain. It is not laid on any property or article of commerce which can be imported or exported; but is simply a tax on money or its representative—on the results or avails of business—that which belongs to the corporation itself, and not *the property of others.* It is not a tax on *property in another state, but on money which is in the treasury of a corporation within this State.*"

This decision seems to leave no doubt that the Supreme Court of Pennsylvania considers the tax on premiums as a tax on property. The Court considered the taxation of the premiums of a Pennsylvania insurance company as a taxation of the property of the company within Pennsylvania, because the premiums were in the treasury of the company in this State. By the same reasoning it must follow that the taxation of the premiums of The Equitable Life Assurance Society is the taxation of the property of that Society and not a license tax, and this property was never in the State of Pennsylvania.

THE TAX BEING A PROPERTY TAX, IT CAN NOT BE COLLECTED.

If the tax sought to be collected by the Commonwealth of Pennsylvania is a property tax, as is contended, then the Commonwealth of Pennsylvania is not entitled to recover, because the property taxed was never owned by The Equitable Life Assurance Society within the State of Pennsylvania. The premiums taxed were paid on the following four classes of policies, viz:

1. Policies taken out outside of Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

2. Policies taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.

3. Policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out.

4. Policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out.

The premiums upon all of the said four classes of policies were paid to the Society at points outside of Pennsylvania, either in the State of its incorporation, New York, or in other States than Pennsylvania. None of the premiums were received by The Equitable Society at its agencies in Philadelphia, Pittsburgh, and Allentown, in the State of Pennsylvania. The premiums were sent by mail, or were paid in person at points outside of the State of Pennsylvania. (Record, page 23.)

As to the first class, the policies were taken out outside of the State of Pennsylvania by non-residents of

said State, but the policyholders subsequently moved into Pennsylvania and were residents of Pennsylvania during the years 1906, 1907, 1908, 1909 and 1910. So far as the taking out of these policies was solicited, the solicitation was made in states other than Pennsylvania and by officers or agents of the Society licensed by and transacting business for the Society in said other states. The policies were issued and delivered to the insured outside of Pennsylvania. (Record, pages 25 and 26.) The Society not only did not own or possess the money derived from premiums on said policies within the State of Pennsylvania, but it did no business within said State so far as such policies were concerned. The Society has no power to prevent the removal into Pennsylvania of a person who has taken out a policy of insurance in another State, and it is obligatory upon it to receive premiums payable upon such policies after the policyholders move into the State of Pennsylvania. How does the removal of such a policyholder into the State of Pennsylvania constitute the doing of business in said State by The Equitable Life Assurance Society? Any insurance company may receive such premiums, even though it be not registered within the State of Pennsylvania to do business. Losses arising under policies issued by The Equitable Society are payable in New York, and the policies contain no restrictions as to residence or travel. (Record, page 34.) If the removal into the State of Pennsylvania of a person upon whose life there is a policy of insurance causes the Society to be doing business within the State of Pennsylvania, then every time an insured person changes his residence the Society changes its place of business. In the case of Army and Naval officers, and others, who have no fixed places of abode, but are constantly on the move, the insurance company would, upon that theory, be constantly changing its place of business, and whether the Constitution

follows the flag or not, the business of an insurance company would follow its policyholders. If such a theory is sound, then a life insurance company has no power to determine where it shall do business. If perchance all of its policyholders should move into the State of Pennsylvania, it would be doing all of its business within said State, although it might never have complied with the laws of that State for doing business therein. Insurance companies, not registered in Pennsylvania, which are receiving premiums from residents of Pennsylvania, are doing business in violation of law.

In *Frawley, Bundy & Wilcox* vs. *Pennsylvania Casualty Co., 124 Fed. Rep., 259,* it appears that a Pennsylvania insurance company wrote certain accident policies on risks in Wisconsin, all of which were negotiated by correspondence with the company, and not through the medium of any agent located in the State or going into it for the purpose. It was held that this did not constitute doing business in Wisconsin. On page 264 Judge Archbald said:

"The mere existence of these two policies in the hands of persons resident in the state does not make out the doing of business within it by the company, with whom they were negotiated and by whom they were written entirely outside of it. The business, such as it was, was done and completed when they were issued. Otherwise the mere change of residence into the state by persons holding policies obtained elsewhere would be enough to establish the charge, and that will hardly be contended for."

In the second class, policies were taken out outside of Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out. Any resident of Pennsylvania has the right to go to another State and take out a policy of insurance, and when he returns to the State of Pennsylvania and pays his premiums on said policy, the company is bound to ac-

cept the premiums. If the theory of the Supreme Court of Pennsylvania is sound, then the taking out of such a policy brings an insurance company into the State of Pennsylvania to do business, even though it has never complied with any of the laws of said State entitling it to do business therein.

The third class consists of policies taken out in Pennsylvania by persons who were residents of Pennsylvania when the policies were taken out. The first premium undoubtedly was paid in the State of Pennsylvania, but subsequently, to suit the convenience of the parties, or of the company, or for business reasons generally, premiums were paid on said policies during the years in question in the State of New York or some other State than Pennsylvania. Is the sending of a check by a resident of Pennsylvania to New York, or the making of a personal visit to New York and paying a premium on a life insurance policy in said State, doing any business in the State of Pennsylvania by the life insurance company receiving the premium?

The fourth class consists of policies taken out in Pennsylvania by persons who were non-residents of Pennsylvania at the time the policies were taken out, but who subsequently removed into Pennsylvania. The premiums on these policies were paid at points without the State of Pennsylvania.

The premiums involved in the present controversy are premiums which were collected outside the State of Pennsylvania in the years specified from residents of Pennsylvania. They were substantially all what are called renewal premiums, that is to say, payments made for the purpose of extending and renewing contracts of insurance. No business as to the original policies, nor as to the renewal thereof, was transacted in Pennsylvania during the year within which any premium was paid. (Record, page 29.)

The mailing of a check by a resident of Pennsylva-

nia to the office of an insurance company in New York does not constitute a transaction of business by the company. The business thus transacted is the business of the person who holds the policy. The United States mail which carries the check, or the money, is his agent, and not the agent of the company. If the money does not duly reach its destination, the loss is that of the person who forwarded it, and not that of the company. No agent of the company in Pennsylvania either received the premiums in suit or transacted any business in respect of the policies upon which the said premiums were paid during any of the calendar years for which the tax is charged.

The taxation of premiums which were never held or owned by The Equitable Society in the State of Pennsylvania is a taxation of property outside of the State of Pennsylvania, and, therefore, forbidden by the Federation Constitution.

In the case of *Delaware, Lackawanna & Western Railroad Company* vs. *Pennsylvania, 198 U. S. 341,* the Supreme Court of Pennsylvania held that the Railroad Company was liable to capital stock tax upon a valuation which included coal which had been in Pennsylvania during the year in question, but which at the time of the appraisement of the capital stock in November, 1899, was without the State of Pennsylvania. This Court reversed the Supreme Court of Pennsylvania, and held that the taxation of property not within the State at the time the appraisement was made was a taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. On page 358 Mr. Justice Peckham said:

"It is true that in general an appraisement of, or an assessment of a tax upon, value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is im-

material, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

"The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

Again, on page 361 he said:

"Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way.

"The judgment of the Supreme Court of Pennsylvania is reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court."

All of the premiums taxed were paid to The Equitable Society in New York, or some other State than Pennsylvania. It required no authority, permission or license from the State of Pennsylvania to accept these premiums. Nor was the payment of a tax upon these premiums a condition upon which the Society could legally transact business in Pennsylvania, and it did *not* become such a condition until after the passage of the Act of June 1, 1911, (P. L. 607). The premiums could have been accepted if the Society had never registered in the State of Pennsylvania to do business. In short, whatever business was done inci-

dent to receiving the said premiums in the State of New York was done under franchises received from the State of New York, and not under any franchises, authority or permission derived from the State of Pennsylvania. The taxation of the premiums is, therefore, in violation of the Fourteenth Amendment to the Constitution of the United States, whether it be considered as a taxation of tangible property without the State of Pennsylvania, or as a taxation of franchises granted by the State of New York, or the business done thereunder. In *Louisville and Jeffersonville Ferry Co.* vs. *Kentucky, 188 U. S. 385,* the Ferry Company was operating a ferry across the Ohio River between Jeffersonville, in Indiana, and Louisville, in Kentucky, under two franchises, one granted by the State of Indiana for maintaining a ferry across that river from the Indiana shore to the Kentucky shore, and the other granted by the State of Kentucky to carry on a ferry business from the Kentucky to the Indiana shore. The tax was laid by Kentucky upon the company, a part of which the company insisted was a tax upon it by reason of its ownership of the Indiana franchise which it contended was property situated in Indiana and beyond the jurisdiction of Kentucky. The courts of Kentucky held that under the taxing statute—

"The Board of Valuation and Assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio River. But under certain sections of the Kentucky statutes, it asssessed the value of appellant's franchise, which is its intangible property. The board did not assess or attempt to assess the property, either tangible or intangible, which it owned in the State of Indiana."

This court held that the taxation was unconstitutional, since the Indiana franchise had its legal situs

only in Indiana. On page 395 Mr. Justice Harlan said:

"As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it directly or indirectly? It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.

"The learned counsel for Kentucky says that it is the value of the company's franchise contained 'in its charter' which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter granted by Kentucky. It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana."

Again, on page 396 he said:

"There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its *situs* in Indiana. While the mode, form and ex-

tent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government. Hence, this court, speaking by Chief Justice Marshall, in McCulloch *vs.* Maryland, 4 Wheat., 316, 429, said that, while all subjects over which the sovereign power of a state extends are objects of taxation, 'those over which it does not extend, are, upon the soundest principles, exempt from taxation.' That proposition, he said, could almost be pronounced self-evident."

Again, on page 398 he said:

"No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana.

"This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another state. There is no sugges-

tion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs,* for purposes of taxation, in Indiana."

The premiums taxed in the case now before the Court were received by the Equitable Society from business which it transacted under its franchise from the State of New York, and the taxation thereof is a taking of the Society's property without due process of law.

THE CONSTRUCTION GIVEN TO THE ACT OF 1895 DEPRIVES THE SOCIETY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The construction given to the Act of the Pennsylvania Legislature of 1895 by the Supreme Court of Pennsylvania deprives The Equitable Life Assurance Society of its property without due process of law. In *Allgeyer* vs. *Louisiana, 165 U. S. 578,* a statute of Louisiana made it a penal offense for any person, firm or corporation to do any business in that State by way of effecting insurance on property in the State in any insurance company which had not complied with the laws of Louisiana. Allgeyer, a resident of Louisiana, mailed, in New Orleans, a letter of advice, or certificate of marine insurance, to the Atlantic Mutual Insurance Company of New York, advising that company of a shipment of one hundred bales of cotton to foreign

ports, in accordance with the terms of an open marine policy. The Supreme Court of Louisiana held this to be a violation of the statute prohibiting the doing of any act to effect insurance on property. The premiums on the insurance were paid in the State of New York, and the losses, if any, were also to be paid in that State. The Supreme Court of Louisiana held that the Legislature of that State could prohibit by penalty one of its citizens from doing any act to effect such insurance as was prohibited by the statute. This Court held that, as the contract was made without the State of Louisiana and the premiums were paid without the State of Louisiana, the insurance company did no business within that State. It further held that no State can pass a statute prohibiting one of its citizens from entering into such a contract, and that a construction by a State court to the contrary is of no validity, because in violation of the Fourteenth Amendment to the Constitution of the United States. On page 587 Mr. Justice Peckham said:

"In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made."

Again on page 588, he said:

"We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notifi-

cation that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

"It is natural that the state court should have remarked that there is in this 'statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired.' Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the State says is its policy with regard to foreign insurance companies which had not complied with the laws of the State for doing business within its limits. *In this case the company did no business within the State, and the contracts were not therein made.*

"The Supreme Court of Louisiana says that the act of writing within that State, the letter of notification, was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was, therefore, prohibited by the statute. *As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law.* The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, *and for that purpose to enter into all contracts*

which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Again, at the bottom of page 590 he said:

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case (supra), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform."

The only difference between the Allgeyer case and the case at bar is that the construction of the Louisiana statute by the Supreme Court of that State deprived Allgeyer of his *liberty* without due process of law, while the construction given to the Act of the Pennsylvania Legislature of 1895 by the Supreme Court of Pennsylvania deprives The Equitable Life Assurance Society of its *property* without due process of law.

So far as policies in classes 1 and 2 are concerned, the contracts were made without the State of Pennsylvania, the premiums were paid without the State of Pennsylvania, and the losses were to be paid without the State of Pennsylvania. The only thing done within the State of Pennsylvania was the mailing of letters by the policyholders enclosing checks for renewal premiums. In some cases even this was not done, as the assured personally paid the money in New York. As the letter of notification in the Allgeyer case did not constitute a contract made or entered into within the State of Louisiana, so the mailing of premiums by the policyholders did not constitute business done within the State of Pennsylvania by the Society. "It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State." As in the Allgeyer case, so in the present case, the Society did no business within Pennsylvania as related to the policies in question. As the construction given to the Louisiana statute by the Supreme Court of that State was a violation of the Fourteenth Amendment of the Federal Constitution in that it deprived the defendant of his *liberty* without due process of law, so the construction given the Act of 1895 by the Supreme Court of Pennsylvania is a violation of the Fourteenth Amendment of the Federal Constitution in that it deprives the Society of its *property* without due process of law. The Fourteenth Amendment prohibits a deprivation of property without due process of law, just as well as a deprivation of liberty without due process of law. If the payment of the premiums on the policies in question did not constitute the doing of any business within the State of Pennsylvania, then such premiums were not taxable. The Society had the right to enter into all contracts which were "proper, necessary and essential" to its carrying out the contracts it had entered into without

the State of Pennsylvania. Residents of Pennsylvania, and also residents of other States than Pennsylvania, have a right under the provisions of the Federal Constitution to contract outside of the State of Pennsylvania for insurance, and no State legislation can deprive them of such right or impose a tax for so doing. The principles laid down in the Allgeyer case should have greater force in the present case, because insurance upon property is usually dependent upon the location of the property, while insurance upon lives is not so dependent, as the residences of the persons insured frequently change.

In *New York Life Insurance Company* vs. *Head, 234 U. S. 149,* in denying the power of one State to extend its authority into another State, Mr. Chief Justice White said, on page 162:

"It is illustrated as regards the right to freedom of contract by the ruling in Allgeyer *vs.* Louisiana, 165 U. S., 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power."

In the opinion of Mr. Justice Potter in the present case, he held that the "business done" was "furnishing protection to the beneficiaries named in the policies." Even assuming as Mr. Justice Potter did, that the beneficiaries lived within the State of Pennsylvania, was he right in further assuming that the "protection afforded" came from within the State of Pennsylvania rather than from the home office of the Society at its domicile in New York? The protection was something passing from the Society to the beneficiaries, and, as the Society is domiciled in New York, it follows that even the business which Mr. Justice Potter said the Society did

in the matter of the policies in question was done in New York and not in Pennsylvania.

The Equitable Life Assurance Society did an immense volume of business in Pennsylvania during each of the years 1906, 1907, 1908, 1909 and 1910, upon all of which it paid the tax into the State Treasury, amounting to nearly $100,000 per annum, but it objects to paying tax upon any part of its business which was not done within the State of Pennsylvania. The fact that it did a large amount of business in said State can not make it liable to pay any tax upon business which it transacted in other States. In the case of *Old Wayne Mutual Life Association of Indianapolis* vs. *McDonough, 204 U. S. 8,* it was alleged that the insurance company did some business within Pennsylvania, but the action in question was based upon business which was not done in Pennsylvania. On page 21 Mr. Justice Harlan said:

"But even if it be assumed that the insurance company was engaged in *some* business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of *all* business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania."

A State May Not Impose on a Foreign Corporation Seeking to Enter its Borders Such Conditions as Deprive it of Rights Guaranteed by the Federal Constitution.

It may be contended by the Commonwealth of Pennsylvania that it has the right to impose upon foreign corporations coming within its boundaries to do busi-

ness such conditions as it may desire. It may be contended that the Commonwealth of Pennsylvania may impose upon a foreign corporation as a condition of doing business within its boundaries an annual tax upon its personal property located outside of the State of Pennsylvania, and a further tax upon its personal property received by its agents within said State, and, in addition thereto, nominal license fees. It is admitted that the several States have the right to impose conditions under which foreign corporations may enter for the purpose of carrying on business, but the conditions which may be imposed are limited to the extent that they can not deprive non-residents of the rights guaranteed under the Federal Constitution. Whether the tax in question be considered a property tax, a license tax or a business tax, it can not be collected if its imposition is violative of the rights guaranteed by the Federal Constitution that property shall not be taken or taxed without due process of law. The Equitable Life Assurance Society contends that even though the facts in the case had been as the Supreme Court of Pennsylvania assumed they were, nevertheless the construction placed upon the Act of 1895 by that Court would deprive the Society of rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

In *Lafayette Insurance Co.* vs. *French, et al., 18 Howard, 404,* the question before the court was whether the State of Ohio in admitting within its borders an insurance company of Indiana might require that service of process upon an agent of the company in Ohio should be considered as service upon the corporation itself. It was held that such a requirement was not violative of the Federal Constitution, but that there was a limitation upon the conditions which might be imposed. Mr. Justice Curtis, on page 407, said:

"A corporation created by Indiana can transact

business in Ohio only with the consent, express or implied, of the latter State, 13 Pet., 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, *provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others,* or that principle of natural justice which forbids condemnation without opportunity for defence."

In *Gloucester Ferry Co.* vs. *Pennsylvania, 114 U. S. 196,* Mr. Justice Field said, on page 206:

"It is true that the property of corporations engaged in foreign or inter-state commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the state. As said by Chief Justice Marshalll in McCulloch *vs.* Maryland, 4 Wheat., 316, 429, 'all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.' "

The Supreme Court of Pennsylvania has recognized the fact that the State can not extend its conditions under which foreign insurance companies may do business therein so as to, in effect, tax property in other States. This appears from the opinion of Mr. Justice Paxson, in the case of *Commonwealth* vs. *Standard Oil Company, 101 Pa. St. 119.* On page 147 he said:

"A foreign corporation has no domicile here, and can have none; hence, it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under license from the state. Some of them have a very large capi-

tal. It is usually invested at the domicile of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company, although the same is located almost wholly in England, or the assets of the New York Mutual located in New York. Whether I am correct in this view or not, it is very certain that a sense of its injustice, or perhaps that courtesy which springs from the comity between the states, has prevented the legislature heretofore from asserting a power of so doubtful a character."

It is not necessary that the tax should be a property tax to come within the protection of the rule. Even though it be strictly a license fee, if the basis of the tax is something beyond the jurisdiction of the court, the tax is unconstitutional. In *Ashley* vs. *Ryan, 153 U. S. 436,* in speaking of a charge imposed by the State of Ohio upon a foreign railroad company doing business in that State, Mr. Justice White said, on page 440:

"Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, *or involved the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits,* it was void, whatever might be the technical character affixed to the exaction."

In *Ludwig* vs. *Western Union Telegraph Company, 216 U. S. 146,* it appears that the State of Arkansas had prescribed as a requirement preliminary to the doing of business therein by foreign corporations, that they should pay into the State Treasury a fee proportioned according to the capital stock of each corporation, although the investments of such capital stock might almost entirely be in other States. This court held the imposition unconstitutional and void, because

it was a burden upon inter-state business, and also because it was a taxation of property outside the jurisdiction of Arkansas. On pages 162 and 163 Mr. Justice Harlan said:

"If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state, *or imposes a tax on its property outside of such state,* then it is unconstitutional and void, although the State Legislature may not have intended to enact an invalid statute. * * *

"The requirement that the company * * * must pay a given amount * * * based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, *as well as on its property outside* of the State. * * *

"We hold the statute in question to be unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the State."

Following the case of *Ludwig* vs. *Western Union* Telegraph Company, supra, this Court, in the case of *Atchison, Topeka & Santa Fe Railway Company* vs. *O'Connor, 223 U. S. 280,* held that the State of Colorado could not impose a tax of two cents upon each one thousand dollars of the capital stock of a company as a condition upon which a foreign corporation might do business within the State of Colorado. On page 285 Mr. Justice Holmes said:

"This is an action to recover taxes paid under duress and protest, the plaintiff contending that the law under which the tax was levied is unconstitutional. A demurrer to the declaration was sustained by the Circuit Court. The tax is a tax of two cents upon each one thousand dollars of the plaintiff's capital stock. Session Laws of Colorado, 1907, c. 211 (April 1, 1907).

The plaintiff is a Kansas corporation. The greater part of its property and business is outside of the State of Colorado, and of the business done within that State but a small proportion is local, the greater part being commerce among the States. Therefore it is obvious that the tax is of the kind decided by this Court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the State."

In *Western Union Telegraph Company* vs. *Kansas, 216 U. S. 1,* in considering the power of the State of Kansas to impose taxes upon a foreign corporation for the privilege of doing business in that State, Mr. Justice Harlan, on page 37, said:

"We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent. of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, *and its property outside of the State,* contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, *but by taxation upon property situated beyond its limits.*"

Again, on page 38 he said:

"We need not stop to discuss at length the specific question whether the State can by any regulation make the property of the company, outside of Kansas, contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury, for the benefit of the state school fund, a given per cent. of all its capital stock as a condition of its doing local business in Kansas. It is firmly established that, consistently with the due process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits."

In *Fargo* vs. *Hart, 193 U. S. 490,* the State of Indiana endeavored to tax foreign express companies by treating the whole business of each company as a unit, and assessing each company on the proportion of the total value of its property in Indiana, determined by the ratio of the mileage in Indiana to the total mileage over which each company operated. It appeared in the case that the total valuation was made up principally of real and personal property not necessarily used in the actual business of the company, and which was permanently located in the State where the company was incorporated. Mr. Justice Holmes, on page 498, said that the real question in the case was—

"Whether the tax provided for by the statute being a tax on property, it sufficiently appears that the board took into account property, which it had no right to take into account in fixing the assessment at the large sum which we have mentioned."

Again, on page 499 he said:

"The general principles to be applied are settled. A State cannot tax the privilege of carrying on com-

merce among the States. *Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere.*"

In *Harrison* vs. *St. Louis & San Francisco Railroad Company, 232 U. S. 318,* this Court held that a State can not destroy the right to remove causes to the Federal courts by imposing arbitrary conditions as to State citizenship, which render it impossible for one (a foreign corporation) entitled to the right to avail of it.

In *Western Union Telegraph Company* vs. *Frear, 216 Fed. Rep. 199,* it was held that a State statute which requires a foreign corporation, as a condition of being permitted to enter the State, to agree that it will not exercise its constitutional right to remove suits to the Federal courts is unconstitutional, and a revocation of its license to do business within the State for a violation of such statute may be restrained.

Under the authority of the cases just cited, it is submitted that the State of Pennsylvania can not impose upon The Equitable Life Assurance Society, as a condition upon which it shall be entitled to do business within the State of Pennsylvania, a tax upon property or franchises or rights which it owns and holds outside of the State of Pennsylvania. In two of the classes of policies hereinbefore referred to the contracts of insurance were entered into without the State of Pennsylvania. The Society has no power to prevent the removal into Pennsylvania of persons upon whose lives it has issued policies of insurance in other States. It not only can not prevent their removal into Pennsylvania, but it is obligatory upon it to receive premiums upon the said policies after the assured have moved into the State of Pennsylvania. To hold that a tax may be imposed by the State of Pennsylvania upon premiums paid for the renewal of the contracts, is the taking of property without due process of law.

Even though it should be held that the State of Pennsylvania may impose a tax upon property without the State of Pennsylvania as a condition upon which a corporation may do business within the State of Pennsylvania, it is still claimed by the Society that no such condition was imposed either in the Act of 1873 or the Act of 1895, or any other Act prior to 1911, which last named Act was subsequent to the years for which the tax in dispute is sought to be collected. As was said by Mr. Justice Harlan, in *Louisville and Jeffersonville Ferry Company* vs. *Kentucky, 188 U. S. 385, on page 398:*

"This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs,* for purposes of taxation, in Indiana."

The provision in the Act of 1873 that no certificate

to do business should be issued until the tax on premiums should be paid, is nothing more than a measure to insure the payment of the tax. For each of the years in question the proper certificate was issued. (Record, pages 29, 30, 31, 32, 33 and 34). In each of said certificates it is certified that The Equitable Life Assurance Society had complied with the requirements of the Act of Assembly of the Commonwealth of Pennsylvania, entitling it to do business.

It is admitted that, as to the policies in classes 3 and 4, the Society did business within the State of Pennsylvania in years prior to the years for which the tax in suit is sought to be collected. The Act of 1895, however, imposes a tax upon premiums only so far as the business was done within the Commonwealth of Pennsylvania during the calendar year for which the tax is sought to be collected. Whatever business was done in the Commonwealth of Pennsylvania, in the matter of the policies upon which the additional tax is imposed, occurred in former years and not in the years for which the tax is claimed. None of the policies upon which the renewal premiums in question were paid outside of Pennsylvania during the years in suit was solicited or issued within those years. The Supreme Court of Pennsylvania has held, in *Mutual Life Insurance Co. of New York* vs. *Girard Life Insurance etc., Co., 100 Pa. St., 172,* that a life insurance policy is a contract for one year, and to be continued in force must be renewed. On page 180 Mr. Justice Paxson said:

"With the non-payment of the premium on the day appointed the policy lapsed by virtue of the contract between the parties, unless there was something to take it out of the ordinary rule. There was no occasion of a formal forfeiture on the part of the company. While the word 'forfeiture' has been used in former opinions it is not strictly applicable to the facts of the case. The contract of life insurance is really a contract for an

insurance for one year in consideration of an advance premium, with the right of the assured to continue it from year to year upon payment of the premium as stipulated. The assured is not bound to pay anything, and may drop his policy at the end of any one year. He does drop it and the company is relieved, if he does not pay. In such case there is a lapse of the policy."

It, therefore, follows that the renewal of a policy of insurance is a transaction of new business. In the present case, the renewals of the policies in each of the four classes were made outside of the State of Pennsylvania and by virtue of the franchises granted The Equitable Life Assurance Society by the State of New York or other States besides Pennsylvania. An insurance company which had not complied with the laws of Pennsylvania for conducting an insurance business within this State might legally have accepted all the premiums involved in this suit, had the policies been written in such company, without the payment of any tax thereon. The Equitable Life Assurance Society might have received the premiums and have transacted all the business done in the years in question with reference to these policies, even though it had previously withdrawn from the State of Pennsylvania and ceased to do business therein. Assuredly, other insurance companies not registered to do business in Pennsylvania, but which were transacting business of the character here involved could not have been held liable to taxation by the State of Pennsylvania. The effort now is to render The Equitable Life Assurance Society liable to tax by that State on the same class of business with reference to which the other companies could not be taxed simply because the Society has sought and obtained the right to carry on certain business within Pennsylvania. Under such circumstances, to require the Society to pay tax upon the premiums in question not only taxes it upon franchises granted to it

by States other than Pennsylvania and imposes tax upon the basis of property never held by the Society within that State, but denies to it the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

If the State of Pennsylvania may impose tax upon property without its borders as a condition upon which a foreign corporation may do business within the State, and may tax premiums which are taxed by other States, then every State in the Union may do likewise and the company may be taxed not only twice or thrice upon the same property, but may be taxed as many times as there are States in the Union, that is to say, it may be taxed to death.

Trial by jury having been waived in pursuance of the Act of the Pennsylvania Legislature of April 22, 1874, the trial Judge definitely and distinctly found, as a matter of fact, that "defendant has paid into the State Treasury of Pennsylvania the tax of two per centum upon all premiums received from business transacted by it within the State of Pennsylvania during the years 1906, 1907, 1908, 1909 and 1910." (Record, page 49). This finding has the effect of a verdict of a jury.

> *Com.* vs *Lehigh Valley R. R. Co., 104 Pa. St., 89;*
> *Com.* vs. *Hulings, 129 Pa. St., 317;*
> *Com.* vs. *Westinghouse Elec. & Mfg. Co., 151 Pa. St., 265.*

The Federal questions involved in this suit were distinctly raised in the trial court in Specifications of Objection Numbers 3 and 4 of the Appeal. (Record, pages 4 and 5). These questions were before the Supreme Court of the State of Pennsylvania, but the opinion of that Court makes no reference to them. In the petition filed, asking for a re-argument of the case, (Record, pages 59, 60 and 61), the attention of the

Supreme Court of Pennsylvania was drawn to the fact that the Federal questions involved had not been taken into consideration, and the failure to so consider them was one of the reasons for asking for a re-argument of the case.

It is, therefore, respectfully submitted that the judgment of the Supreme Court of the State of Pennsylvania is erroneous, and should be reversed.

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Supreme Court, U. S.
FILED
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JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 263

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

Brief for Defendant in Error

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Brief for Defendant in Error

QUESTIONS INVOLVED.

---

1. Is the sending by an insured resident of Pennsylvania of a renewal premium on a policy of life insur-

ance to non-resident agents, through the mails, and receiving from such agent renewal receipt "business done within this Commonwealth," within the meaning of a statute taxing gross premiums received from such business?

2. Does the interpretation of what is "doing business" within the meaning of the Pennsylvania Statute, involve any "Federal Question?"

COUNTER STATEMENT OF CASE.

There is no dispute of the facts in this case. They were presented to the trial court in the form of affidavit and agreements.

Note.—In this connection by some over-sight, an agreement as to the method of paying losses was omitted from the record and is not found in the transcript of record. It is printed at the end of this book, (pages 1a-3a).

The material facts are:

The Equitable Life Assurance Society of the United States, which has its home office in New York City, admittedly, was engaged in doing business in Pennsylvania. It maintains three cashier agencies in Pennsylvania. It has paid tax upon all of the premiums which were paid to the three cashier agencies in Pennsylvania.

Residents of Pennsylvania for the years in question, for personal reasons chose to pay the renewal pre-

miums through some other cashier agencies outside of Pennsylvania or to the home office.

The State of Pennsylvania taxed the premiums received from such payments, claiming that they were "received from business done within this Commonwealth within the entire calendar year preceeding" as provided by its statute.

The method of paying renewal premiums is as follows:

The company sends to the proper cashier agency the proper form of receipt, and upon payment of renewal premium by the insured at the cashier agency, the receipt is delivered to the insured showing the payment of the renewal premium, thus extending and continuing the life of the policy, or contract of insurance.

> "The Society usually knows where it is most convenient for the insured to make payment; but frequently, upon request, transfers him from one cashier agency to another."
>
> *Affidavit of William A. Day.* (Record page 25.)

The policies upon which these renewal premiums were paid are entitled to annual dividends (record page 34) and these annual dividends are paid to the resident holders in Pennsylvania. When an insured resident of Pennsylvania dies proofs of death are required to be furnished to the Society and such proofs are executed in Pennsylvania.

In some cases there is doubt as to the death of the insured, or doubtful circumstances surrounding the same, the Society sends into the State experts to make investigations. (Agreement page 2a this book).

Upon an appeal from the settlement of tax by the accounting officers of the State of Pennsylvania, the Court of Common Pleas of Dauphin County held that

the premiums received from residents of Pennsylvania, which were sent through agencies outside of Pennsylvania, or directly to the home office, were not received from "business done" within the State of Pennsylvania.

Upon an appeal by the Commonwealth to the Supreme Court, the Supreme Court of Pennsylvania reversed the Trial Court and held that the premiums thus received were from "business done" within the State of Pennsylvania, (239 Pa. 288.) From the judgment of the Supreme Court of Pennsylvania, the Society appeals to this Court.

ACTS OF ASSEMBLY.

This tax is claimed under the provisions of the Act of Assembly of Pennsylvania of June 28th, 1895, (Pamphlet laws 408).

However, the other Acts of Assembly of Pennsylvania may be used as showing the history and character of the tax.

The Act of April 11th, 1868 (Pamphlet laws 83), entitled:

> "An Act to revise, amend and consolidate the several laws regulating the licensing of foreign insurance companies,"

provides for cash assets of at least two hundred thousand dollars, makes requirements as to reports, and requires a written application for a license.

Section 5 provides:

> "That every such insurance, trust or annuity company or association as aforesaid shall, before issuing any policy or agreeing to issue any policy, or transacting any business whatever in this commonwealth, forward to the auditor general the statement required by this act, together with a written application for a license to transact their said business in this state, signed by the agent appointed by such company."

Other provisions with reference to bond follow.

Section 6 provides:

> "That upon filing of the statement, application for license, power of attorney and bond required by this act, the auditor general shall, if he is satisfied that the said company or association as aforesaid is possessed of the assets stated, and that they are of the value represented in the statement, grant to such company a license to transact business in this Commonwealth, by their said agent,"

for one year.

This section also provides for the payment to the Commonwealth of the sum of five hundred dollars "for the privilege of transacting business in this State for the full term of one year, and in the same proportion for any less period, together with the usual fees of the Auditor General for filing the statement and application and issuing said license."

Section 7 provides:

> "That the agent of every insurance company or association, licensed under the provisions of this

act, shall retain in his hands, out of the moneys received by him for premiums, gross sums paid for annuities and commissions for executing trusts, a sum equal to a tax of three per centum upon the entire amount of said premiums or commissions received by him as agent aforesaid, whether said premiums are received in money or in the form of notes, credits, loans or any other substitute for money; which said sums shall be paid to the treasurer of the Commonwealth at the time of the expiration of the license of said agent" etc.

The Act of April 4, 1873 (Pamphlet laws 20), entitled:

"An Act to establish an insurance department" provides in Section 5 that the Insurance Commissioner therein created "is hereby invested with all the powers now conferred by law upon the Auditor General in relation to the licensing of agents of foreign insurance companies."

And in paragraph ten of Section 5 the Insurance Commissioner is authorized "to revoke or modify any certificate of authority, when any conditions prescribed by law for granting it no longer exist."

The ninth section provides:

"It shall be unlawful for any person, company or corporation to negotiate or solicit within this State any contract of insurance or to effect an insurance or insurances, or pretend to effect the same, or to receive and transmit any offer or offers of insurance, or receive or deliver a policy or policies of insurance, or in any manner to aid in the transaction of the business of insurance without complying fully with the provisions of this act."

The tenth section provides:

> "No person shall act as agent or solicitor in this State of any insurance company of another state, * * * * until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority * * * * * and it shall be the duty of every such company or association * * * To make report to the commissioner * * * showing the entire amount of premiums of every character and description received by said company or association in this State, during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits or any other substitute for money, and pay into the state treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury."

The Act of June 28th, 1895, P. L. 408 is a supplement, *not to the insurance laws, but to the revenue laws of the Commonwealth,* and provides for a report by every insurance company to the Auditor General, setting forth the amount of premiums received, and at the end of section one contains this proviso:

> "That hereafter the annual tax upon premiums of insurance companies of other states or foreign governments, shall be at the rate of two per centum *upon the gross premiums of every character and description received from business done within this Commonwealth* during the entire calendar year preceding."

The Act of June 1st, 1911 (Pamphlet laws 607), is mentioned merely because it is referred to in the opinion of the dissenting justices. Section 16 of that Act provides, in part:

> "Every insurance company or association of another state or foreign government, authorized to do business in Pennsylvania, shall make report to the Insurance Commissioner, on or before March first of each year, under oath of its president or secretary, showing the entire amount of premiums of every character and description received from business transacted in the Commonwealth during the year, or fraction of year, ending with the thirty-first day of December preceding, whether said premiums were received in money, or in the form of notes, credits, or any other substitute for money, *or whether the same were collected in this Commonwealth or elsewhere,* and pay into the State Treasury the requisite tax upon such premiums."

The italicized words make the only change. The effect of them will be later discussed.

ARGUMENT.

The contentions of the Defendant in Error are:

1. THERE IS NO SUBSTANTIAL FEDERAL QUESTION EITHER RAISED OR DECIDED. THE ONLY QUESTION IS WHAT IS "DOING BUSINESS" UNDER THE PENNSYLVANIA STATUTE.

2. THERE IS NO GUARANTEE RIGHT TAKEN AWAY NOR ANY DENIAL OF DUE PROCESS OF LAW.

3. THE CASE WAS RIGHTLY DECIDED, EVEN IF A FEDERAL QUESTION WERE RAISED.

I.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION EITHER RAISED OR DECIDED. THE ONLY QUESTION IS WHAT IS DOING BUSINESS UNDER THE PENNSYLVANIA STATUTE.

The Plaintiff in Error did specify in its appeal the following:

> "The said account is erroneous, illegal and void because it includes tax upon gross premiums which were paid to and received by appellant at its office in New York, or elsewhere outside of Pennsylvania, and which never were within the State of Pennsylvania,"

which it alleges violated the Fourteenth Amendment to the Constitution of the United States. (Record page 4).

It also in its ninth specification of appeal alleged:

> "Insurance Companies of other states and countries generally have been required to pay for the year 1906 tax on such premiums only as were paid to and collected by them within the State of Pennsylvania,"

and for this reason alleged also that the account appealed from violated Section 1 of the Fourteenth Amendment to the Constitution of the United States. This second allegation was not supported by proof, or insisted on.

The real, substantial and only question is whether the receiving of renewal premiums from residents of Pennsylvania, at the home office or through the medium of agents outside of Pennsylvania, and returning to such insured residents of Pennsylvania renewal receipts for said premiums was "doing business" in Pennsylvania.

Every phase of this case hangs upon the *construction as to what is "doing business."*

This is a Pennsylvania statute. What it means is for the Pennsylvania Courts to determine.

This statute regulates the terms upon which a foreign corporation comes into the State, and such regulation is a question exclusively for the State of Pennsylvania.

The State of Pennsylvania has a right to impose the conditions upon which a foreign insurance company may do business in the State.

In *Hooper* vs. *California, 155 U. S. 648*, Mr. Justice White said:

> *"The principle that the right of a foreign corporation to engage in business within a State other than that of its creation, depends solely upon the will of such other State, has been long settled, and many phases of its application have been illustrated by the decisions of this court."*

He also said, page 655:

> "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. *The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States.*"

Therefore,

The State of Pennsylvania has the right to impose a tax on the Plaintiff in error based upon the "business done" in Pennsylvania,

And

Under the authority just cited *it has the right to define what shall constitute business done within the State of Pennsylvania.*

This is a STATE and not a FEDERAL question.

No Judge has Found any Federal Question in this Case.

The Plaintiff in Error insists that since the Act of Assembly of June 1st, 1911 (Pamphlet laws 607) no question remains concerning its liability to this tax. (Argument of Plaintiff in Error page 16.) That is to say, since the Act of 1911 taxing the premiums "whether the same were collected in this Commonwealth or elsewhere" no federal question arises.

In other words as to the premiums the Plaintiff *is doing business in Pennsylvania under the Act of 1911, but was not doing business under the Act of 1895.*

This demonstrates that the so-called federal question attempted to be raised is a phantom.

No Court or no Judge who considered this case found any necessity to even refer to this so-called federal question. No reference to any federal question or to due process of law is found in the opinion of the Court of Common Pleas of Dauphin County, or of the Supreme Court, or of the dissenting opinion of the Supreme Court Justices.

There was abundant reason for basing the decision upon other grounds.

In the case of *"The Victory," 6 Wall. 382,* it was held:

> "Before this court can entertain jurisdiction to review a judgment of the State court, it must appear that one of the questions mentioned in the twenty-fifth section of the Judiciary Act was raised in the State court, and *actually* decided by it; that is to say, the question must have received the consideration or attention of the Court. It is not sufficient that this court can see that it *ought* to have been raised, and that it might have been decided."

It has many times been held:

> "To give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the State having jurisdiction, *but that its decision was necessary to the determination of the cause, and that it was actually decided,* or that the judgment as rendered could not have been given without deciding it."
>
> *Cook County vs. Calumet & Chicago Canal Co. 138 U. S. 635.*
>
> *Wood vs. Skinner, 139 U. S. 293.*
>
> *Johnson vs. Risk, 137 U. S. 300.*
>
> *Blount vs. Walker, 134 U. S. 607.*
>
> *San Francisco vs. Itsell, 133 U. S. 65.*

It is also said in *Rutland Railroad vs. Central Vermont Railroad, 159 U. S. 630, 640:*

> "It is well settled, by a long series of decisions of this court, that where the highest court of a state, in rendering judgment, decides a Federal

question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question."

It is, therefore, submitted that the only question in this case was what was "doing business" under the Pennsylvania statute, and, the State of Pennsylvania, having the right to determine the conditions upon which the Plaintiff in Error did business in Pennsylvania, has also the right to define what "doing business" meant. The Plaintiff in Error must abide by that decision, and come in the State or stay out of the State, upon the terms prescribed.

The Plaintiff in Error concedes the right of the Legislature to define "doing business." If there is no Federal question *when the Legislature defines* what "doing business" is, then there is no Federal question *when the Court interprets* the Legislative definition.

It is, therefore, confidently submitted that no real, substantial Federal question has been raised in this record, and certainly none has been decided.

II.

THERE IS NO RIGHT GUARANTEED BY THE FERERAL CONSTITUTION TAKEN AWAY NOR ANY DENIAL OF DUE PROCESS OF LAW.

As to Guaranteed Rights.

The Plaintiff in Error argues that this judgment takes away some right that is guaranteed to it under the Federal Constitution, but, it does not point out of what right it is deprived.

If the premiums taxed are from 'business done' in Pennsylvania then Pennsylvania has the right to tax them.

If they are not, then there is no right to tax.

The whole matter involves only what is doing business in Pennsylvania, under this Pennsylvania statute.

This is for Pennsylvania, and not for the United States courts to determine.

The business of insurance is not interstate commerce. *New York Life Ins Co. vs. Cravens 178 U. S. 389. Hooper vs. California 155 U. S. 648.*

Therefore there is no interference with Interstate Commerce. The tax is on business done in the state, not on property located out of the state, therefore there is no attempt to tax property outside of Pennsylvania.

The long argument of Plaintiff in Error (Pages 39-47) citing cases on the subject is not pertinent.

There is no Federal Guarantee involved. There still remains, notwithstanding the arguments of counsel, only one question, viz:

If these premiums are received from business done in Pennsylvania they are taxable, otherwise they are not.

As To Due Process of Law.

The Plaintiff in Error is driven to the defense that it is deprived of due process of law.

This defense, Mr. Justice Mitchell, in the case of *Commonwealth* vs. *Philadelphia and Reading Coal and Iron Co., 145 Pa. 283,* characterized as "*The last resort of desperate cases.*"

What possible denial of due process of law can there be in this case?

The law operates upon all alike in the same class.

Duncan vs. *Missouri, 152 U S. 377.*

There is abundant remedy, which the case itself shows, to have the question adjudicated.

Davison vs. *New Orleans, 96 U. S. 97.*

No remedy has been taken away from the plaintiff in error.

Gilman vs. *Tucker, 128 N. Y. 190.*

No Interstate Commerce is attempted to be controlled by the Pennsylvania Statute.

New York Life Insurance Co. vs. *Cravens, 178 U. S. 389.*

Therefore, the question again recurs to the determination of what is "doing business" within the State of Pennsylvania.

The Plaintiff in Error bases its contention upon the case of *Allgeyer* vs. *Louisiana, 165 U. S. 578.*

This case was urged on the Supreme Court of Pennsylvania, and, if this is a Pennsylvania question, the determination of the Supreme Court of Pennsylvania is conclusive.

Moreover the case of *Allgeyer* vs. *Louisiana* did not involve a question of taxation. It considered only a question of restriction of the right to contract with a non-resident insurance company. The insurance company had not appointed any agent in Louisiana. It had not complied with the conditions required by the laws of that State for doing business within the same.

The defendants made a contract with the insurance company for an open policy of marine insurance for $200,000 to cover cotton bales purchased and shipped by them on which drafts might be drawn for the purchaser.

The defendants mailed a communication stating insurance was wanted by the defendants on account of the open policy, loss if any, payable at Paris, in French currency, $3400 on one hundred bales, which, at the the time of the communication, were within the State of Louisiana. The premiums to be paid under the contract of insurance and the loss or losses under the same were payable in the city of New York, the premiums being remitted by the defendants from New Orleans by exchange.

Mr. Justice Peckham, said (page 587).

> "In the case before us the contract was made beyond the territory of the State of Louisiana, and

the only thing that the facts show was done within that State was the mailing of the letter of notification as above mentioned, which was done after the principal contract had been made."

Quoting from the opinion of Mr. Justice White, in the case of *Hooper* vs. *California, 155 U. S. 648*, which the case of *Allgeyer* vs. *Louisiana* reaffirms, he says (page 587).

> "It is said the right of a citizen to contract for insurance for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen *the right to make within his State either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction.*"

The question in the case of *Allgeyer* vs. *Louisiana* was a question of contract. The contract was admittedly made beyond the State. The Court held (page 588):

> "The letter of notification did not constitute a contract made or entered within the State of Louisiana."

In the *Allgeyer* case it is said (page 589):

> "In this case the company did no business within

the State and the contracts were not made therein."

In the case at bar the company is doing business within the State and there is no question of where the contract was made or is to be performed.

The question is whether the premiums paid by the residents in the State, the return to residents of the renewal receipts for those premiums, and the payments of dividends to those residing in the State, constitute "business done" for which those premiums were received.

It is respectfully submitted that, although the case of *Allgeyer* vs. *Louisiana* seems to be the principal case relied on, it does not sustain the plaintiff in error in the contention that the State of Pennsylvania in taxing the premiums in this case is depriving the defendant of due process of law.

The Tax is a Tax on Business, Not on Property.

In order to sustain the argument of a denial of due process of law the Plaintiff in Error indulges in a long argument attempting to sustain the proposition that this tax is a tax on property, and, being a tax on property, the property, to-wit: the premiums, were in the State of New York and not in the State of Pennsylvania, and therefore beyond the taxing power of Pennsylvania. The argument is captious.

The Act of 1868, the first Pennsylvania Act on the subject, provided that—

> "Before any fire, marine or life insurance, trust, or annuity company or association * * * shall receive * * * *such license as aforesaid,* they shall pay to the treasurer of the state for the use of the Commonwealth, the sum of five hundred dollars for the *privilege of transacting business in this State,"*

and that Act also provided

> "That the agent of every insurance company or association, licensed under the provisions of this Act, shall retain in his hands * * * a sum equal to a tax of three per centum upon the entire amount of said premiums or commissions received by him as agent aforesaid * * * which said sum shall be paid to the Treasurer of the Commonwealth."

The Act of 1873 provided that

> "No person shall act as agent or solicitor in this State of any insurance company of another State * * * until the provisions of this Act have been complied with * * * and it shall be the duty of every such company or association * * * to pay into the State Treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State Treasury."

The Act of 1895 provides

> "That hereafter the annual tax upon premiums of insurance companies of other States or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received *from business done within this*

Commonwealth during the entire calendar year preceding."

The Act itself defines the character of the tax. It is imposed upon BUSINESS DONE.

It is not a license tax in the sense in that it can only be measured by the cost of supervision.

It is not a property tax.

It is not only designated by the act itself a tax upon business, but it is in fact such a tax.

The argument upon the limitation of license fees and upon taxation of property out of the State does not touch the question before the court.

The cases, such as, *Atlantic and Pacific Telegraph Co.* vs. *Philadelphia, 190 U. S. 160* and *Postal Telegraph Cable Co.* vs. *Taylor, 192 U. S. 64* do not apply.

In any event these cases refer to the inspection of corporations engaged in instersate commerce, and not to the terms upon which a corporation, not so engaged may do business in a state.

It is, therefore, confidently contended that there is no substantial basis for the claim that the plaintiff in error has been deprived of any right guaranteed under the Federal Constitution or denied due process of law.

The Supreme Court of Pennsylvania did not assume the existence of any essential fact not in evidence.

In order to bolster up the existence of a "Federal Question" the burden of the argument of the Plaintiff

in Error is that the Supreme Court of Pennsylvania assumed facts, which were not in the case, and that this assumption is a denial of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

This question is not properly raised. It is not subject to any assignment of error.

It is true that such a question could not have been raised in the Supreme Court of Pennsylvania, but it could have been raised by the assignments of error in this Court. None of the assignments of error raise any such question. (Record pages 70-72).

> "Only those federal questions may be argued which have been raised, although facts are disclosed by the record on which another might have been raised."
>
> *Dewey* vs. *Des Moines, 173 U. S. 193.*

The argument that the State Supreme Court assumed the fact not in the record was not referred to or called to the attention of the Supreme Court of Pennsylvania in the petition for re-argument (Record Pages 59-61), nor in this Court in the petition for a writ or error (Record pages 64-67), nor in the assignments of error filed in this Court (Record pages 70-72), nor in the statement of the case in the argument of the plaintiff in error.

It is an after-thought.

In the petition for re-argument, the plaintiff in error states the case as follows:

> "The decision appears based upon the proposition that, no matter where the insurance was effected or the premiums paid, the business done is

> that of affording indemnity and protection of residents of Pennsylvania. It is the contention of your petitioner that the statute does not consider the amount of protection or the residence of the protected person, but does consider the place where the business was done within the year for which the tax is charged and the premiums derived from that business."

In the petition for the writ of error no mention is made of the grounds upon which the decision of the State Court was based. In the first assignment of error it is alleged that the Supreme Court of Pennsylvania erred in holding that business done within the Commonwealth of Pennsylvania

> "Consisted in furnishing protection to beneficiaries named in the policies against loss from the death of the insured to the amount designated by the policy."

In the statement of the case (Argument page 5) it is said the Supreme Court based

> "Its decision on the ground that the business done within the State by the Society during the year for which the premiums were paid was furnishing protection to the beneficiaries named in the policy."

But nowhere is there any statement of an error that the Supreme Court of Pennsylvania assumed a fact which did not appear of record.

Assuming, however, that the question is raised, the answer to this proposition is three-fold.

First: The Supreme Court of Pennsylvania did not assume the fact as contended by Plaintiff in Error.

Second: It did not base its decision upon such fact.

Third: The fact, even if assumed, was not essential to the decision.

As to the first proposition, an examination of the Opinion of the Supreme Court of Pennsylvania, will show:

That the word "beneficiaries" is not used in the sense of persons to receive insurance after the death of the insured, but is intended to include the insured.

In the Opinion (Record pages 54-56) it is said:

> "It seems however, that the premiums for insurance written and maintained upon the lives of residents of Pennsylvania, are not all paid to the agencies in Pennsylvania."

It also says:

> "When it comes within our borders to do business, it renders a service; it furnishes protection and indemnity to *its* beneficiaries, residents of the State of Pennsylvania."

The word *"its"* evidently does not mean beneficiary under the policy, but refers to the insured.

It is, therefore, suggested that the Supreme Court did not intend to assume as an *essential* fact that the beneficiaries who received the insurance after the death of the insured were residents of Pennsylvania.

Second: The Supreme Court of Pennsylvania certainly did not base its Opinion upon any assumption that the beneficiaries were residents of Pennsylvania.

As already quoted, Mr. Justice Potter said,

> "That the premiums for insurance written and

maintained upon lives of residents of Pennsylvania,"

and further,

"Manifestly the business in which the Society is engaged is that of insuring lives,"

and

"When it comes within our borders to do business which renders a service,"

and

"Furnishing that service, that insurance against loss, it makes a proper charge to cover the cost of the service which it renders, and the charge is the premium. It is simply payment for the valuable service it renders."

Again

"How can the fact, or the character, of the business done for the benefit of residents of Pennsylvania, be altered or effected in any way, by the manner in which, or the place where, the payment for the business done and the service rendered is made?"

Again

"For precisely the same service rendered, to residents of this State, in the one case where payment for that service is made to an agency in Pennsylvania, it admits its liability to the tax; but where a payment is made outside the state it denies liability."

These quotations taken together with the entire Opi-

nion demonstrate that the Supreme Court of Pennsylvania did not base its Opinion upon the mere fact that beneficiaries under the policies were residents of Pennsylvania.

The Supreme Court of Pennsylvania said the business transacted by the Society is the soliciting of insurance on lives by means of agents and re-assuring and renewing policies of insurance and collecting premiums thereon, and meant to say, and did say; that it was the insurance of lives in Pennsylvania which constituted the transaction of the business with reference to these particular policies.

Third: As to the third proposition, even assuming that the Supreme Court did state a fact of which there was no evidence in the record, as hereinafter pointed out, it is in no way essential to the decision of this case. There is abundance in the Opinion of the Supreme Court and in the case, to sustain the judgment upon the proposition that the Society is admittedly doing business in Pennsylvania. It is insuring lives in Pennsylvania, receiving premiums for insuring the lives of residents of Pennsylvania, delivering to those residents renewal receipts for the particular year and paying those residents dividends upon the policies for the particular year.

This is the transaction of business for which these premiums were received.

While it is admitted as a proposition of law that the erroneous assumption of a *material fact without which the judgment could not be entered,* might be sufficient to sustain a proper assignment of error, as taking of property without due process of law, there is no such situation in this case. There is no assumption of a fundamental fact.

The case of *Fayerweather* vs. *Ritch, 195 U. S. 276,*

does not sustain the Plaintiff in Error. If there were the finding of a fundamental fact in this case it would be the converse of the case of *Fayerweather* vs. *Ritch.* In that case it was held:

> "Where it appears that a question was distinctly put in issue and the parties presented, or had an opportunity to present their evidence, and the question was decided by a Court of competent jurisdiction, private right and public welfare both demand that the question so adjudicated shall, except in direct proceedings for review be considered as finally settled and conclusive upon the parties."

> "Where in an action in a Court of competent jurisdiction the validity of certain releases is put in issue by the pleadings and no judgment can properly be rendered without determining that question, and judgment is rendered against the parties executing the releases and who were before the trial Court, the judgment in effect determines that the releases are valid and the question of their validity is res judicata notwithstanding no special findings in regard thereto were made by the trial Judge."

Mr. Justice Brewer (page 308) said,

> "Finally, by the motion to amend its remittur, the attention of the Court of Appeals was specifically called to these very matters which are now urged as showing a failure on the part of the lower Courts to determine the question of the validity of the releases, and it refused to make any order which would permit a further consideration. Nothing can be clearer from this record than that the question of the validity of the releases was not only before the State Courts, but was considered and

determined by them, and the regularity of the procedure was sustained by the highest Court of the State. This question was, as affirmed by counsel for these appellants, put in issue by the pleadings, and its determination was a necessary prerequisite to an adverse judgment. It was referred to by all the Courts in their opinions, was affirmatively decided by the general term, its decision sustained by the Court of Appeals and reaffirmed by that Court, by a refusal to amend its remittur. Under these circumstances the pleas of res judicata were properly sustained, and the decree of the Circuit Court dismissing the bill and cross bill is affirmed."

In quoting from the case of *Fayerweather* vs. *Ritch*, we note that the part quoted in the argument of the Plaintiff in Error is a statement of the *contention* of counsel rather than the *conclusion* of the Court. In the case of *Fayerweather* vs. *Ritch* the Court did not formally find the fact. In this case it is contended that the Court found a fact that was not presented by proof. In that case attention was called to the matter by a motion to amend its remittur. In this case the attention of the Court was called by a motion for a re-argument.

Therefore, it is safe to assume that the Supreme Court of Pennsylvania, having had its attention called to the matter, did not base its opinion upon the fact that the beneficiaries under the policies were residents of Pennsylvania, but even if it had this fact is not essential to support its decision.

III.

THE CASE WAS RIGHTLY DECIDED, EVEN IF A FEDERAL QUESTION WERE RAISED.

This tax is "upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding."

The business done for which the tax is claimed may be divided into two classes:

(a) Where the original policy was written out of the State.

(b) Where the original policy was written in the State.

These two classes may be subdivided as follows:

1. Where the policies were taken *outside* of Pennsylvania, by persons who were *non-residents* at the time the policies were taken out, but who subsequently moved into the State and continued to pay the premiums to outside agencies.

2. Where policies were taken *outside* of Pennsylvania by persons who were residents of Pennsylvania at the time the policies were taken out and who continued for the years mentioned to pay the premiums to outside agencies.

3. Where policies were taken out *in* Pennsylvania by persons who were *residents* of Pennsylvania when the policies were taken out, which were contracted for by Pennsylvania agents and the first premium paid in the State, but where the insured, for reasons of their own, for the particular years paid the premium to outside agencies.

4. Where policies were taken out *in* Pennsylvania by persons who were *non-residents* of Pennsylvania at

the time the policies were taken out, but the contract was made with agents in Pennsylvania and the first premium paid to them and since the making of the original contract the assured moved into the State, but for some reason paid the premiums for the years in question to outside agents.

The amount of premiums divided among these four classes for the several years is as follows:

Class	1906	1907	1908	1909	1910
1	$129,091.84	$142,546.45	$128,230.54	$116,100.24	$117,611.00
2	145,355.37	139,879.73	144,291.82	150,370.65	135,535.83
3	724,743.86	757,480.89	736,566.58	668,492.13	611,466.62
4	17,280.01	10,863.10	10,192.82	30,034.06	12,172.10

The Insurance Commissioner settled the tax on September 20, 1910, on these amounts, for 1906, 1907, 1908, 1909 and 1910, aggregating $98,516.13.

The Tax is on Business Done, Not on the Insurance Contract.

The claim of the Commonwealth is that the language "*gross premiums of every character and description received from business done within this Commonwealth*" was intended to include, and does include, the payment of premiums by residents of this Commonwealth.

To confine this language to a narrow construction of business done in the sense of what may be considered doing business determined by the situs of the contract would be defeating the purpose of the Act.

It is undoubtedly the law that the situs of the contract of life insurance is the home office of the insurance company in all contracts of insurance. All policies re-

quire payments to be made at the home office of the company, and all policies agree that losses should be paid *at the home office of the company.*

In that sense *no business is done in this State* because the contract is made in New York.

It is apparent that the place of making the contract and the place for its performance cannot determine where business is done within the meaning of this Act of Assembly.

Commerce Mutual Accident Co. vs. *Davis, 213 U. S. 245.*

Penna. Lumbermans Mut. Fire Ins. Co. vs. *Meyer, 197 U. S. 407.*

Manifestly the Act of Assembly does not refer to the making of the contract alone as the doing of business, because the contract, in contemplation of law, was made in New York.

The act takes gross premiums OF "EVERY CHARACTER AND DESCRIPTION, received * * * *during the entire calendar year.*"

After the contract is made the only thing remaining from year to year is the payment of premiums, and therefore the Act of Assembly referred to the PAYMENT OF PREMIUMS, and not to the MAKING OF THE CONTRACT as "business done within this Commonwealth."

What is the Business of the Company.

The company is engaged in life insurance business and it is admitted that it does business in Pennsylvania. (Affidavit of Wm. A. Day Record page 20).

"A 'life insurance policy' is not a contract of indem-

nity, but is a contract to pay money upon the death of the assured in consideration of certain payments made during his life."

Wayland vs. *Western Life Indemnity Co., 166 Mo. App. 221; 148 S. W. 626, 630.*

Reed vs. *Provident Sav. Life Ass. Soc., 190 N. Y. 111.*

This company's business is insuring lives in Pennsylvania.

What is Done Under the Contract.

Let us examine the process—

1. *The assured sends his money to an agent out of the state, or to the Home Office.*

Assume the assured mails a check. If it goes to an agent in Philadelphia it is conceded by defendant to be "business done" in the State. If the mails carry it across the river to an agent in Camden, it is argued that it is NOT "business done" in the State.

Does the traveling the extra mile or two work the change?

In the one case it is contended that the United States mail is the agent of the assured and the sender, but in the other case the agency of the assured is not raised.

2. *A dividend is paid* EVERY *year to the Assured in Pennsylvania* on these policies. The Policy provides (Record page 34):

"This policy shall participate ANNUALLY in the dis-

tribution of the Surplus of the Society as ascertained and apportioned by it.

Dividends, at the option of the Insured (or the assignee, if any) shall in each year, on the anniversary of the register date hereof, be either,

1. Paid in cash; or" (then follow 3 other options).

3. *The Company maintains three offices in Pennsylvania but it transfers the insured upon request to any agency in or out of the State.*

The affidavit of Wm. A. Day says:

> "It sends to the proper cashier agency the proper form of receipt * * and upon the payment of the renewal premium by the insured at the cashier agency, *the renewal receipt is* DELIVERED *to him, showing the payment of the renewal premium.*" (Record page 25).

If the mail is the agent of the assured in sending the premium, certainly the same mail is the agent of the insurance company in delivering the receipt.

The contract of renewal for another term is not complete without the delivery of receipt.

And this delivery is done in Pennsylvania.

4. *In case of death the proofs are executed in the State.*

The agreement of counsel (printed at the end of this book page ....) says:

> "It not infrequently happens that the beneficiary of an insurance policy asks some person with whom he is acquainted, and who is an agent of the company, to assist him in making up his proof of loss.

If the agent does so, he does it without charge either to the Society or to the insured or to the beneficiary."

5. *In case of dispute the Company sends its adjuster into the State.*

In the agreement of counsel (page ... of this book) it says:

"In a few cases where there was some doubt as to the death of the insured, or there were some doubtful circumstances surrounding the same, the Society has sent an expert or experienced person from its home office to make investigations and report to the home office before payment was made, *and that is the course it would be most likely to pursue if any such contingency should arise as to any of its present outstanding policies, but such contingencies seldom arise.*"

So that:

1. *The premium is paid in the State by the life insured in the State.*

2. *A dividend is paid the insured in the State.*

3. *A renewal receipt is delivered to the insured in the State.*

And all these things are done DURING THE YEAR.

In addition:

In case of death: Proofs are executed in the State and in case of dispute, an adjuster is sent into the State.

What are all these things if not acts of business? When the insured pays his premium, he is doing

something. What he does is not play. It must be business.

When a check was sent to New York to pay a note; when interest is paid on a mortgage; when monthly rent is paid on a lease, it is *business.*

When a receipt for an insurance premium is given, is it not business?

When a receipt for interest or for rent is delivered, is not that business?

There is no other description for it.

Even if the sending of the money out of the State, by a strained construction, should be said to be not doing business *in the State,* yet the delivery of the receipt is doing business, *and is done in the State.* So with the payment of dividends to the insured in the State, the conclusion is irrestistible that this is "business done" in the State, and that the premiums taxed are "from business done in the State."

Where the Subject Matter is and What is Done Under an Insurance Contract May Determine Where Business is Done.

It may be well to consider the character of a life insurance contract and what its incidents are.

A contract of life insurance is not a contract of indemnity, it is a contract to pay a specified sum on a contingency involving the death of the person insured without regard to the value of the life. *25 Cyc. 702.*

The whole subject matter of the contract is a human life. The consideration for the contract is not paid at one time, but in instalments, and it is a continuing obligation depending upon the payment to the company.

At the death of the insured the company requires

proofs of loss to be made out and sworn to by the beneficiary or legal representative of the estate, and in cases where there is any difficulty of payment the company sends representatives into the State to adjust the payments.

The life insured—that is, the subject matter of the contract—was in the State.

The money was sent by the insured to the company from the State.

All of the incidents with reference to the execution of this contract on the part of the company are done in the State.

An insurance contract is *executed* so far as the insured is considered, and *executory* so far as the company is concerned.

The contract is executed from year to year by the insured, living in Pennsylvania.

It is submitted that under the rule laid down by the Pennsylvania authorities, where the subject matter of insurance is in the State, it is a doing of business in the State.

In *Swing* vs. *Munson, 191 Pa. 582,* a foreign fire insurance company, organized under the laws of Ohio, appointed a trustee to wind up its affairs. It did not comply with the laws of this State with reference to registration. On October 1, 1888, Munson made application for insurance upon property *in Pennsylvania* and policies were issued to him on the deposit of proper premium notes.

> *"The application and notes were executed at Williamsport and transmitted by mail to the office of the company at Cincinnati, whence was mailed to him the policy.* Ostensibly, there was no agent of the company in this State, *but before Munson*

made out and transmitted his application, before he even knew of the existence of the company, one Hotchkin, a resident of Elmira, called upon him in Williamsport, and suggested that he take out policies in the company. It was denied that Hotchkin was an agent for the company. * * * *The contract was consummated by direct correspondence between Munson at Williamsport and the officers of the company in Cincinnati."*

* *It was argued that the contract was made in Ohio, and being valid there, under the Constitution of the United States, was enforceable in Pennsylvania.* The Court said:

> *"The evidence does not show that the contract was made in Ohio; to our minds, it shows quite the contrary;* the attempt by a pretense to shift the place of contract to Ohio, to evade the prohibitions of our statutes, is so manifest that it would, perhaps, have warranted a peremptory instruction to the jury to find for defendant on the evidence. But that we may meet a more important question, because it affects the interests of all foreign insurance companies that seek to do business in this State, we prefer to assume that the contract was made in Ohio, and is lawful there. * * * * * It was the indemnification of a citizen of Pennsylvania against loss by fire *on property wholly within Pennsylvania;* without regard to where the contract was made, the subject of it was property within this State; *it is the attempt of a foreign insurance company to do business in this State in violation of the laws of this State."*

Applying these principles to this case, it is insisted that the policies of this company were upon the lives

of citizens "wholly within Pennsylvania" and "the subject of it was a life within the State."

The principal authority urged in support of the argument of plaintiff in error, to wit, *Allgeyer* vs. *Louisiana, 165 U. S. 578,* was presented in the brief in the Munson case.

In the case of *Insurance Company* vs. *Sharpless,* 12 *Super. Ct.* 333, the Superior Court of Pennsylvania admitting to have followed the case of *Allgeyer* vs. *Louisiana* in a former case, takes a back track when it says, page 338:

> "This Court held in *Ins. Co.* vs. *Storage Co., 6 Pa. Super. Ct. 288,* a policy of fire insurance issued and delivered in Massachusetts upon property in Pennsylvania; to be a Massachusetts contract, governed by the laws of that State and free from taint of illegality, by reason of the existence of the penal and prohibitory legislation of Pennsylvania. We based our conclusion in part upon the case of *Allgeyer* vs. *Louisiana, 165 U. S. 578,* and in part upon *Commonwealth* vs. *Biddle, 139 Pa. 605.* In the case of *Swing* vs. *Munson, 191 Pa. 582* (decided since *Ins. Co.* vs. *Storage Co.,* supra) *the Supreme Court of Pennsylvania has held differently."*

These cases are referred to because it is contended that what is "doing business" in Pennsylvania, is a Pennsylvania question, determinable by Pennsylvania Courts.

In *Pennsylvania Lumbermen's Mutual Fire Insurance Company* vs. *Meyer, 197 U. S. 407,* this Court has determined principles which governed this case.

The insurance company issued policies upon a mill building, and additions.

"The plaintiff in error is a fire insurance corporation organized under the laws of the State of Pennsylvania, and its office is in Philadelphia. Written applications were duly made to it for the issuance of the policies in suit, and were mailed from Rochester, N. Y., where it received the same. All transactions between the company and said insured, subsequent to the issuance of said policies, and until after the destruction of said property by fire, were by correspondence, in writing, from Philadelphia to him at Rochester, and he writing from Rochester to it in Philadelphia.

"Three of the said company's thirteen directors resided in the State of New York, but the only act done by them for it, is to attend from time to time the meetings of the board of directors, which are held in the city of Philadelphia, and there to give such advice and take such action in connection with its business as may seem to them proper. They perform no duties and do no acts for the company in the State of New York and never have. The company has no agents or officers within that State and has not had at any time. It has no office within that State, has never been authorized or licensed by the insurance department thereof to do business therein, and has not taken the steps required by law for that purpose. At the date of the service of the summons, as aforesaid, the said company had and now has about nine hundred thousand dollars ($900,000) outstanding insurance on property within the State of New York, which is something less than one-third of its total risks. The applications therefor were made by mail, addressed to it at Philadelphia, and the policies were executed and issued at that city and sent by mail from there to the insured within the state of New York.

"Ever since the plaintiff in error was incorporated, it has been engaged in the business of insuring property located in the State of New York and other states against loss by fire, and has sent by mail circulars from Philadelphia into said State soliciting business. In the prosecution of its business and for the purpose of increasing it, the company sends its general manager to the different conventions of lumbermen held in the State of New York, for the purpose of urging upon those attending such conventions the advantages of insuring with it. It sends its adjusters into the State of New York when a loss by fire occurs there to property insured by it, for the purpose of adjusting the amount of such loss. It originally placed insurance upon the property covered by the policies in question, after its manager had pointed out the advantage of insuring in the company, the conversation being had at the city of Rochester, in that State."

Mr. Justice Peckham said (pages 414, 415):

"Was the company doing business in New York State? Nearly one-third of the amount of its total fire risks was in that State when these policies were issued and when the loss occurred. If it be conceded that the contract was made in Philadelphia, it does not follow that all its business was therefore done in the State of Pennsylvania. *The contract was an insurance policy issued upon real estate and machinery in a building situated in the city of Rochester, in New York. The contract was to pay the amount of the loss, which might be sustained by fire, as specified in the policy. The policy provides for the manner of determining the amount of this loss, either by agreement*

between the company and the owner, or, in case of disagreement, then by the appraisers, as already stated. * * * * A fire insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies, as it is when engaged in making contracts to take such risks. If not doing business, in such case, what is it doing? It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract, and in order to carry out its provisions, and it could not be properly carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated. This is not a sporadic case, nor the contracts in suit the only ones of their kind issued upon property within the State of New York. Many contracts of the nature of the one in suit were entered into by the company, covering property within the State. *We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that State to perform the various acts of adjustment provided for it by contracts and made necessary to carry them out."*

The Commonwealth of Pennsylvania therefore contends that these cases of *Swing* vs. *Munson, Insurance Company* vs. *Sharpless Brothers* and *Lumbermen's Insurance Company* vs. *Meyer,* are decisive of this question, if the situs of the subject matter of the contract

is to govern and the principles apply as well to life insurance as to fire insurance.

This company was admittedly doing a large business in Pennsylvania.

Therefore the case of *Trawley, Bundy & Wilcox* vs. *Pennsylvania Casualty Co., 124 Fed. 259* has no application. In that case the corporation never had an agent in the State, and only four policies were held in the State, all negotiated by correspondence.

As to two classes involved in this claim, the contracts were actually made in Pennsylvania. The subject of the contract is in Pennsylvania and as to those two classes they are decidedly doing more business than was done in either of the three cases cited.

The other two classes, the original contract having been made when the insured was out of the State, are precisely like the case of *Swing* vs. *Munson,* and *Lumbermen's Insurance Company* vs. *Meyer,* where the application was sent out of the State by mail and the policy sent into the State by mail. In both of these cases the companies were not otherwise doing business in the State, except through the mails, *but because the thing insured was in the State, and because in the case of a loss an adjustment was required to be made in the State, the company was held to be doing business, although the contract was made by mail and the premiums sent out of the State by mail.*

The principle as to life insurance is precisely the same.

In the classes where the contract was made out of the State, the subject matter of the contract, to wit, the life of the resident, is here; *in case of death a proof of loss must be prepared and executed here by the insured or personal representative;* dividends paid

to the insured residing here; in case of dispute, the company's agent in the State, or special agents sent into the State, endeavor to adjust the dispute.

There are other cases which throw light upon the tendency of the courts in matters of this kind.

In the case of *Mutual Life Insurance Company* vs. *Spratley, 172 U. S. 602,* the material facts were that the corporation, a life insurance company of the State of Connecticut, did an insurance business in Tennessee from 1870 until July 1, 1894. In 1889 it insured the life of Benjamin R. Spratley, in the sum of $5,000 for the benefit of his wife, and in 1893, in the sum of $3,000 in favor of his wife. The policies were issued through the solicitation and by the procurement of the agent of the company for the states of Tennessee and Kentucky, who had headquarters in Louisville, Ky. He came to Memphis, and solicited the insurance and the application for that was taken by the agent at Memphis. The premiums were paid up to the time of Spratley's death, in February, 1896, *and presumably since the company left the state, in July, 1894, they were sent by mail because there was no agent in the State to receive them. The company had a number of other policies on the lives of other people in the State. It does not appear that after July, 1894, the general agent for Kentucky and Tennessee, was in the State of Tennessee, when the payment of any premium was made to him, by Tennessee policy holders. He received the payments in Louisville, Ky.* At the time of Mr. Spratley's death, the company sent a special agent to Memphis, to investigate and adjust the claim. A compromise was suggested, which was refused, and suit brought. The special agent was served, in Memphis, with process. Mr. Justice Peckham, discussing these facts, says, pages 610-611:

"*We think the evidence in this case shows that the company was doing business within the State at the time of this service of process.* From 1870 until 1894, it had done an active business throughout the State by its agents therein, and had issued policies of insurance upon the lives of citizens of the State. How many policies it had so issued, does not appear. Its action in July, 1894, in assuming to withdraw from the State, was simply a recall of its agents doing business therein, the giving of a notice to the State insurance commissioner, and a refusal to take any new risks or to issue any new policies within the State. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them, and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent.

* * * * "*It cannot be said with truth, as we think, that an insurance company does no business within a State unless it have agents therein, who are continuously seeking new risks and it is continuing to issue new policies upon such risks.* HAVING SUCCEEDED IN TAKING RISKS IN THE STATE THROUGH A NUMBER OF YEARS, IT CANNOT BE SAID TO CEASE DOING BUSINESS THEREIN WHEN IT CEASES TO OBTAIN OR ASK FOR NEW RISKS OR TO ISSUE NEW POLICIES, WHILE AT THE SAME TIME ITS OLD POLICIES CONTINUE IN FORCE AND THE PREMIUMS THEREON ARE CONTINUOUSLY PAID BY THE POLICY HOLDERS TO AN AGENT RESIDING IN ANOTHER STATE, and who was once the agent in the State where the policy holders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at

the time of the service of process on Mr. Chaffee in Memphis."

The Commonwealth contends that this case is on all fours with reference to all of the policies involved in this suit; proofs of claim must be made in the State, affidavits of the claimant, a personal representative of the deceased, and in case of a dispute with reference to these very policies, either the agent now in the State or special agents would be sent to adjust the claims.

In the case of *Mutual Reserve Society* vs. *Phelps, 190 U. S. 147,* a similar condition existed. Prior to 1899 the society was doing business in Kentucky. On October 10, 1899, the Insurance Commissioner cancelled the license which had theretofore been issued to the Society, and gave it notice that from and after that date all authority granted from his department to it, and all licenses issued to its agents to do business in the State of Kentucky, were revoked. From and after that date the society had no agent or agents in the State of Kentucky, and did no new business whatever in the State. In 1885 James S. Phelps applied for membership and had a certificate of insurance issued to him. Breaches of the agreement on the part of the defendant were alleged and suit was brought asking among other things, for the appointment of a receiver to take charge of the business in Kentucky. The case was then removed to the United States Circuit Court and the brief of counsel indicates an elaborate and thorough argument, and upon the simple proposition that there was an outstanding insurance in the State of Kentucky the company was held to be doing business in that State. Mr. Justice Brewer said, page 157.

"It was stipulated between the parties that the outstanding policies existing between the associa-

tion and citizens of Kentucky were continued in force after the action of the insurance commissioner on October 10, 1899, *and that on said policies the association had collected and was collecting dues, premiums and assessments. It was, therefore, doing business within the State. Mutual Life Insurance Company* vs. *Spratley, 172 U. S. 602.*"

Under these cases, if the Equitable Assurance Society withdrew from Pennsylvania and had no insurance except the policies concerning which this dispute arises it would still be doing business as to them in Pennsylvania.

In *Johnson* vs. *the Mutual Reserve Life Insurance Company, 43 Miscellaneous Rep. (N. Y.) 251,* the facts appear as follows: These were actions brought by assignees of judgments which were recovered against the defendant company in the State of North Carolina. Service on all these cases was made on the 13th day of April, 1899, on the Insurance Commissioner of North Carolina. On the 18th day of May, 1899, the defendant withdrew all of its agents through whom it had theretofore done business in the State of North Carolina. The Court said, page 254:

> "But the evidence established that, notwithstanding this withdrawal, the defendant nevertheless, transacted business after this date in that State. A review of the evidence upon this point will, I think, establish this fact beyond question. *Policies remained in force after the date of the alleged withdrawal, premiums upon these policies were paid by persons living in North Carolina, by remitting the premiums to the home office of the defendant in New York City.* Where losses occurred

the defendant remitted the amount of the loss, as adjusted, to the person entitled to receive it in the State of North Carolina. An agent of the defendant, after the date of the alleged withdrawal, went into the State of North Carolina, with authority to adjust a particular loss, and actually adjusted it. In one instance, the defendant instructed a bank in the State of North Carolina, to receive premiums due on a policy and to deliver a check in payment of the amount of the policy. On another occasion, it authorized a member of the bar of that State, as its attorney, to adjust a disputed claim, which duty said attorney duly performed. *Upon still another occasion, the proof shows that the defendant issued a new policy to a policy holder residing in the State, upon the surrender of the old policy. The surrender of the old, and the issue of the new policy were effected by mail.*

"While it is true, that the plaintiff has proved only isolated instances showing the acts enumerated above, *it can hardly be doubted that all of these instances establish the fact that the defendant was doing business in the State of North Carolina at the time service was made upon the insurance commissioner.*" The case just cited was affirmed in the Appellate Division of the Supreme Court, by four judges; *104 App. Div. Sup. Ct., 544.*

It will be noted that the adjustment of claims by an attorney in one case, and by an agent in another, with reference to other policies of insurance, and the exchange of policies by mail, while only isolated instances, proved that the defendant was doing business, so as to sustain the service of process in that case.

It is contended by the Commonwealth, here, that the

delivery of renewal receipts, the payment of dividends and the method of the company with reference to the payment of losses upon these very policies in suit, in case of death, sustains the proposition that the payment of premiums to the company, even through the medium of an outside agency, is doing business in the State.

It may be suggested that the fact that the company may do business with reference to these particular policies, when the death of any one of the insured occurs, is no answer to the proposition that the business is not being done now because the death has not occurred. It is submitted that the fact that the company treats all of its insured in Pennsylvania in the same way, it being here doing business, demonstrates that with reference to these classes of insurance, it is doing business in Pennsylvania.

As a test of this proposition, it may be pertinent to ask where the business is done, if not in Pennsylvania. Let us suppose a case. A payment is made to an agent in Ohio, who transmits it to the company in New York, and in turn the company in New York sends the agent in Ohio the renewal receipt, the agent in Ohio sends the renewal receipt to the insured in Pennsylvania. If that business which relates to the insurance of a life in Pennsylvania, paid by a resident of Pennsylvania, and a receipt delivered to him in Pennsylvania and dividends paid to him, is not business done in Pennsylvania, where is it done?

It could hardly be said that it was done in Ohio, because the money was received and transmitted to New York.

It could hardly be said to be done in New York, because there was more connection with it in Ohio than in New York.

If that particular payment of a premium is business

done in New York, then any other premium paid by a Pennsylvania resident to an agent in Pennsylvania and transmitted to New York is likewise business done at the home office, and this the law has determined is not so. It is therefore submitted that there is only one logical conclusion to the whole controversy and that is that the payment of the premium by a resident of Pennsylvania, concerning a policy on a life in Pennsylvania, cannot be separated from the residence of the insured, and is business done in Pennsylvania, and not outside of Pennsylvania, merely because the premium may be sent by mail to an outside agent.

Is the Policy Contract, a Single Contract.

However attempting to get away from this position, the Plaintiff in Error contends the policy contract is a single contract and that

> "Whatever business was done in the Commonwealth of Pennsylvania, in the matter of policies upon which the additional tax is imposed, occurred in former years and not in the years for which the tax is claimed." (Argument Plaintiff in Error, page 48.)

The Supreme Court of Pennsylvania answers this argument (Record page 56).

> "The suggestion is made in the opinion of the trial judge that the business of the society is completed when the policy is issued; and the first premium paid. This is a mistake. Renewal premiums must be paid from year to year, in most cases, to keep the policy alive. Unless they are

paid, the service rendered, the insurance furnished comes to an end. Insofar as the statute is concerned, the payment of each years premium stands upon its own footing. It is payment for the insurance furnished, the business done during the current period. The taxing statute makes no difference between first premiums and renewal premiums. The tax is to be paid upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year."

This argument of the Plaintiff in Error demonstrates the length to which it goes. In the argument before this Court it now contends that the business concerning these policies was done when the policies were originally issued and "occurred in former years and not in the years for which the tax is claimed."

It has shifted its position in its argument. Before the Trial Court it there said:

> "The renewal of that contract of insurance was an entirely and separate distinct business and it was transacted elsewhere and subject to an entirely distinct jurisdiction."

The Plaintiff in Error blows both hot and cold. It endeavors to escape tax upon the class of policies originally taken out in Pennsylvania on the ground that the renewal premium is the consideration of a *separate* contract and it endeavors to escape tax on the class of policies originally taken out by non-residents of Pennsylvania on the ground that the original policy constituted an entire single contract and the renewal premiums are only incident thereto.

But it makes no difference where the contract was originally made.

The question is where the business was done, not where the contract was made. Therefore the division into classes is of no avail.

If there was anything to be based on the question as to where the insured resided when the policy was originally taken out, then in classes where the insured resided in Pennsylvania there is no defense whatever.

> "That the contract of insurance is completed at the place where the policy is delivered, and the first premium collected, has become familiar law. *May on Insurance, Sec. 66; Equitable Life Assurance Society* vs. *Clements, 140 U. S. 226; 35 L. Ed. 500; Grevenning* vs. *Washington Life Assurance Company, 112 La. 879; 36 South., 790.*"

In *Equitable Life Assurance Society* vs. *Clements, 140 U. S. 226,* in which this very form of contract was before the Court, Mr. Justice Gray, for the United States Supreme Court, determined that the contract was made in Missouri, where the application was sent, the insured resided, and the policy delivered.

In *Hartman & Daniells* vs. *Holowell, 126 Iowa, 643,* where an agent seems to have obtained an application and delivered a policy of a company not otherwise doing business in the State, the Court said (p. 647):

> "Issuing these policies and delivering them to plaintiffs was doing business in this State, within the meaning of these statutes,"

and the statutes made it a misdemeanor for an officer or agent to solicit insurance for companies not authorized to do business, and required registration in the State such as the statute of Pennsylvania requires.

It seems to be superfluous to add any further argu-

ment upon the proposition that as to the class of cases where the application was obtained and the policy delivered to residents of the State, the subsequent payment of premiums, even though the money be sent to outside agencies, is business done within the State.

But the Commonwealth of Pennsylvania insists that this case cannot turn on this question.

The question is one of "doing business" not of contract.

The Fact That a License Was Issued is No Defense

The Society argues that the Insurance Commissioner of Pennsylvania granted it a license to do business, without demanding these taxes, inferring that the taxes cannot now be claimed.

It is sufficient to say that the settled law of Pennsylvania is that a mistake of her agents does not bind her.

In *Eastern Bank* vs. *Commonwealth, 10 Pa., 442,* a case much cited and relied on, it is said (p. 451).

> "Her (Easton Bank) reluctance to obey, no doubt, originated on the tardiness of the accounting officers of the government in calling her attention to this duty, probably caused by mutual misapprehension. But this neglect will not excuse her ultimate compliance; for the rights of the Commonwealth are not liable to be compromised by the nonfeasance of her agents, nor can her debtor escape through the mistake of her servants acknowledging a sum less than the whole due, as received in full."

In the case of *Commonwealth* vs. *Coal & Iron Co., 145 Pa. 283,* the Court said:

> "No neglect of the State officials, upon whom the primary duty of assessing and imposing the penalty is cast by statute, can prevent this court from passing the judgment required by the law when the facts of the case are before it."

Opinion of the Dissenting Justices.

Justices Brown and Fell dissented from the judgment of the Supreme Court of Pennsylvania. In the opinion of Mr. Justice Brown it would seem that his dissent applies only to those policies which were originally issued to persons then non-residents of the State who have since moved into the State.

He says:

> "I am at a loss to understand how it can be held that this includes premiums paid at the home office in New York, in accordance with the terms of the policies *which were issued to non-residents outside of the State.*" (page 57).

He then says:

> "If the Legislature intended that the Act of 1895 was to include them, it would have so declared instead of waiting until 1911 to do so."

The palpable error in this language is assuming that the Act of 1911 did nothing except to attempt to settle the question in dispute in this case.

The Act of 1911 did not change the definition of what was "doing business" in the State.

It re-enacted in terms the Act of 1895, adding only the italicized words, as follows:

> "Every insurance company or association of another state * * * shall make report to the Insurance Commissioner * * * showing the entire amount of premiums of every character and description received from business transacted in the Commonwealth during the year, or fraction of year, ending with the thirty-first day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, *or whether the same were collected in this Commonwealth or elsewhere,* and pay into the State Treasury the requisite tax upon all such premiums."

If the premiums taxed in this case are not from "business done" in Pennsylvania, then the fact that the Act of 1911 uses the language *"whether the same were collected in this Commonwealth or elsewhere,"* does not enlarge the power to tax.

Furthermore, the reason for the passage of the Act of 1911 is plain. This case was then pending in the trial court. The questions had all been raised and the simple reason for the passage of the Act of 1911 was, if possible, to save any further future question, in the event of an adverse decision.

Therefore, the dissenting opinion is not even persuasive of any error in the judgment of the court.

The Finding of the Trial Judge as to What is Doing Business is not Conclusive.

On page 50 of the argument of the Plaintiff in Error occurs this paragraph:

> "Trial by jury having been waived in pursuance of the Act of the Pennsylvania Legislature of April 22, 1874, the trial Judge definitely and distinctly found, as a matter of fact, that 'defendant has paid into the State Treasury of Pennsylvania the tax of two per centum upon all premiums received from business transacted by it within the State of Pennsylvania during the years 1906, 1907, 1908, 1909 and 1910.' (Record, page 49). This finding has the effect of a verdict of a jury."

This finding is not a finding of fact. What is "business transacted within the State of Pennsylvania" is a question of law. Neither in Pennsylvania nor elsewhere is the finding of any trial judge on the question of law held to be the effect of the verdict of the jury.

The cases cited by the Plaintiff in error do not apply. The plaintiff in error paid in all it claimed was due "from business transacted by it within the State of Pennsylvania," but whether what it paid in was all that was due depended upon the question of law as to what constituted "business done" in Pennsylvania.

Conclusion.

For the reasons submitted in this brief, as well as those stated in the opinion of the Supreme Court of Pennsylvania, it is submitted:

That there is no real substantial Federal question involved in this case.

That the Plaintiff in error is not deprived of any of the rights guaranteed to it under the Federal Constitution by the imposition of this tax.

That there is no denial of due process of law.

That the premiums in question were received from business done in Pennsylvania and are taxable under the Pennsylvania statute.

Therefore, the judgment of the Supreme Court of Pennsylvania should be affirmed.

WILLIAM M. HARGEST,
Second Deputy Attorney General.
FRANCIS SHUNK BROWN,
Attorney General.
For Commonwealth of Pennsylvania,
Defendant in Error.

APPENDIX.

AGREEMENT AS TO METHOD OF PAYING LOSSES.

COMMONWEALTH OF PENNSYLVANIA *vs.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.	In Dauphin Common Pleas, No. 36, Commonwealth Docket, 1910.

IT IS HEREBY AGREED, That, in response to a question by the Deputy Attorney General, the President of the defendant Society would, if upon the witness-stand, testify as follows:

"All policies issued by the Equitable Life Assurance Society contain upon their face a statement that the Society

" 'Hereby insures the life of JOHN DOE (hereinafter called the insured), and agrees to pay at its home office in the City of New York, $..... to ....., beneficiary(with the right on the part of the insured to change the beneficiary), upon receipt of due proof of the death of the insured, provided this policy is then in force and is then surrendered, properly released.

" 'There are no restrictions under this policy on travel, residence, occupation, or military or naval service.

" 'This policy shall be incontestable after one year after date of issue, provided the premiums have been duly paid.'

"It is frequently the fact that the beneficiary, to

whom the policy is payable, does not live in the same State as the insured. Both the insured and the beneficiaries are notified upon the face of the policy that it is not necessary to employ any person, firm, or corporation to collect the insurance, and that they can write direct to the Society, 120 Broadway, New York. All checks in payment of policies are issued at the home office, at 120 Broadway, New York. The Society does not employ agents outside of its home office in New York for the purpose of paying losses. The Society does encourage its agents everywhere to be courteous and obliging, and it not infrequently happens that the beneficiary of an insurance policy asks some person with whom he is acquainted, and who is an agent of the company, to assist him in making up his proof of loss. If the agent does so, he does it without charge either to the Society or to the insured or to the beneficiary. It is not necessary that the insured or the beneficiary shall consult any agent at all, and if he does so, it is at his own option and for his own convenience, and it is quite as apt to be an agent in some other State as in the State in which the insured resides, and this is particularly true of all those policies the premiums upon which are paid in States other than those in which the insured resides. The Society does not maintain or need any agent in Pennsylvania for the purpose of paying losses.

"As this company's policies are incontestable after one year, it is very seldom that any question arises after the death of the insured. In a few cases where there was some doubt as to the death of the insured, or there were some doubtful circumstances surrounding the same, the Society has sent an expert or experienced person from its home office to make investigations and report to the home office before payment was made, and that is the course it would be most likely to pursue if any such contingency should arise as to any of its

present outstanding policies, but such contingencies seldom arise."

Defendant's counsel does not object to the making of proof in this manner, if such proof be admissible at all, but does object that it is inadmissible as irrelevant and immaterial, in view of the fact that the holders of the policies upon which were paid the premiums sought to be taxed in this case are still living, and it does not appear in what State the beneficiaries, or any of them, resided during the respective years for which taxes are claimed, or in what State either the insured persons or the beneficiaries named in the policies will reside at the maturity of the policies by the death of the insured, or otherwise. No losses were paid on any of these policies during the respective years for which taxes are claimed, and the possible, or probable, method of securing payment covering the policies at such time in the future as they shall mature, has no bearing in determining the question whether the premiums taxed were received from business done within this Commonwealth within the respective calendar years for which the taxes are claimed.

(Sgd.) Wm. M. Hargest,
Asst. Deputy Atty. General.
(Sgd.) Olmsted & Stamm,
Attorneys for Defendant.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, STATE OF PENNSYLVANIA.

No. 263. Argued May 5, 6, 1915.—Decided June 14, 1915.

A State may tax life insurance companies upon business done within the State and measure the tax upon the premiums on policies of residents of the State; and, in estimating the amount of premiums, those paid by residents to foreign insurance companies outside of the State may be included without depriving such companies of their property without due process of law.

Taxation has to be determined by general principles.

The Pennsylvania Act of 1895, levying a tax of two per cent. on gross premiums, of life insurance companies received for business done within the State, does not amount to taxing property beyond its jurisdiction as to the premiums paid directly to a corporation outside of the State. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, distinguished.

239 Pa. St. 288, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of a statute of Pennsylvania taxing the gross premiums on life insurance policies issued within the State, are stated in the opinion.

Mr. Charles W. Pierson and *Mr. Wm. S. Snyder*, with whom *Mr. Thomas DeWitt Cuyler* was on the brief, for plaintiff in error:

The assumption by a state court of a fact not in evidence as a basis for decision is a denial of due process of law.

The tax sought to be collected is a property tax, and as such cannot be collected.

The construction given to the act of 1895 deprives the society of its property without due process of law.

A State may not impose on a foreign corporation seeking to enter its borders such conditions as deprive it of rights guaranteed by the Federal Constitution.

In support of these contentions, see *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Ashley* v. *Ryan*, 153 U. S. 436; *Atchison &c. Ry.* v. *O'Connor*, 223 U. S. 280; *Atlantic & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Chi., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Pennsylvania* v. *Hulings*, 129 Pa. St. 317; *Pennsylvania* v. *Lehigh Valley R. R.*, 104 Pa. St. 89; *Pennsylvania* v. *Standard Oil Co.*, 101 Pa. St. 119; *Pennsylvania* v. *Westinghouse Co.*, 151 Pa. St. 265; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341; *Fargo* v. *Hart*, 193 U. S. 490; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Firemen's Association* v. *Scranton*, 217 Pa. St. 585; *Frawley* v. *Pennsylvania Casualty Co.*, 124 Fed. Rep. 259; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Harrison* v. *St. L. & San Fran. R. R.*, 232 U. S. 318; *Insurance Co.* v. *Commonwealth*, 87 Pa. St. 173; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Mutual Life Ins. Co.* v. *Girard Life Ins. Co.*, 100 Pa. St. 172; *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. 149; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *West. Un. Tel. Co.* v. *Frear*, 216 Fed. Rep. 199; see also Acts of April 11, 1868, Pennsylvania cited, P. L. 83; 1873, P. L. 20; 1874, P. L. 109; 1879, P. L. 112; 1889, P. L. 420; 1895, P. L. 408; 1911, P. L. 607.

Mr. William M. Hargest, Second Deputy Attorney General of the State of Pennsylvania, with whom *Mr. Francis Shunk Brown*, Attorney General of the State of Pennsylvania, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The Equitable Life Assurance Society of the United States, the plaintiff in error, does business in Pennsylvania. By an act of June 28, 1895, that State levies an annual tax of two per cent. upon the gross premiums of every character received from business done within the State during the preceding year. The Company paid large taxes under this act, but appealed to the state courts from charges made by the State Accounting Officer in respect of premiums for the years 1906, 1907, 1908, 1909 and 1910, paid to the Company outside the State by residents of Pennsylvania. The Supreme Court sustained the charge. 239 Pa. St. 288. The whole discussion there was whether these items fell within the statute. On that point of course the decision of the state court is final, and as the Company is a foreign corporation and this is held to be a tax for the privilege of doing business in the State, it is obvious that the scope of the question before us is narrow, being only whether the statute as construed deprives the Company of its property without due process of law, contrary to the Fourteenth Amendment, as alleged. It is true that the plaintiff in error suggests a further infraction of that amendment in an assumption by the Supreme Court of an unproved fact: that the beneficiaries of the policies lived in Pennsylvania. But it is enough to answer that we understand the decision when it uses the word beneficiaries to mean parties to the contracts, the insured, and that the assumption was warranted by the record as to them.

The grounds for the only argument open are that a State cannot tax property beyond its jurisdiction, *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; that it cannot effect that result indirectly by making the payment a condition of the right to do local business, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v.

Kansas, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; and that as it could not prohibit the contracts it cannot impose the tax. *Allgeyer* v. *Louisiana*, 165 U. S. 578. In aid of the effort to make the foregoing decisions applicable it is argued that this is a property tax. But, as we have said, the Supreme Court of Pennsylvania speaks of it as a tax for the privilege of doing business within the Commonwealth, and whether the statement is a construction of the act or not we agree with it so far at least as to assume that if that characterization is necessary to sustain the tax, the Legislature meant to avail itself of any power appropriate to that end.

Without going into any preliminary matters that might be debated it is enough for us to say that we agree with the Supreme Court of the State in its line of reasoning; applying it to the claim of constitutional rights which that court did not discuss. The question is not what is doing business within a State in such a sense as to lay a foundation for service of process there. It being established that the relation of the foreign company to domestic policy holders constituted doing business within the meaning of the statute, the question is whether the Company may be taxed in respect of it, in this way, whatever it may be called. We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policy holder would of itself give jurisdiction over the Company. The argument of the state court is that the Company is protecting its insured in Pennsylvania equally whether they pay their premiums to the Company's agent in Philadelphia or by mail or in person to another in New York.

These are policies of life insurance and according to the

statement of the plaintiff in error are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the Company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. See *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 611; *Pennsylvania Lumbermen's Mut. Fire Ins. Co.* v. *Meyer*, 197 U. S. 407, 415. It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows.

Judgment affirmed.